No. 89-1555-CSX
Status: GRANTED

Title: Mark E. Dennis, Petitioner
v.
Margaret L. Higgins, Director, Nebraska Department of Motor Vehicles, et al.

Docketed:
April 5, 1990

Court: Supreme Court of Nebraska

Counsel for petitioner: Allen,Richard A.

Counsel for respondent: Spire,Robert M.

NOTE: Counsel states petr shld be as above

Entry	Date	Note	Proceedings and Orders
1	Apr 5 1990	G	Petition for writ of certiorari filed.
2	May 7 1990		Brief amicus curiae of American Trucking Associations, Inc. filed.
4	May 7 1990	X	Brief of respondents Higgins, et al. in opposition filed.
3	May 8 1990		DISTRIBUTED. May 24, 1990
5	May 18 1990	X	Reply brief of petitioner Mark Dennis filed.
6	May 29 1990		Petition GRANTED.
			**********
7	Jul 13 1990		Joint appendix filed.
8	Jul 13 1990		Brief of petitioner Mark E. Dennis filed.
9	Jul 13 1990		Brief amicus curiae of American Trucking Associations, Inc. filed.
10	Aug 15 1990		Brief amici curiae of National Conference of State Legislatures, et al. filed.
12	Aug 15 1990		Brief of respondent Margaret Higgins, et al. filed.
11	Aug 21 1990		Record filed.
		*	One envelope of exhibits received.
13	Aug 28 1990		CIRCULATED.
14	Sep 17 1990	X	Reply brief of petitioner Mark Dennis filed.
15	Sep 26 1990		SET FOR ARGUMENT WEDNESDAY, OCTOBER 31, 1990. (2ND CASE)
16	Oct 31 1990		ARGUED.

89-1555

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK E. DENNIS,
Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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QUESTION PRESENTED

Whether a claim that a state tax discriminates against interstate commerce in violation of the Commerce Clause and that seeks an injunction against enforcement of the tax is cognizable under 42 U.S.C. § 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents. [1]

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska (App. A, *infra*) is not yet reported. The opinion of the district court of Lancaster County (App. B, *infra*) is not reported. The judgment of the district court of Lancaster County denying petitioner's motions for class certification and preliminary injunction is set forth in App. C, *infra*.

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[1] Petitioner is Mark E. Dennis. Respondents are the following officials of the State of Nebraska: Margaret L. Higgins, Director, Nebraska Department of Motor Vehicles, Gerald C. Strobel, Director, Nebraska Department of Roads, and Frank Marsh, Nebraska State Treasurer. Respondents are successors in office to other officials whom petitioner sued in their official capacities for injunctive relief.

JURISDICTION

The judgment of the Supreme Court of Nebraska (App. A, *infra*, 1a-27a) was entered on February 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . .
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Pertinent provisions of Nebraska's retaliatory tax statute, Nebraska Rev. Stat. § 60-305 (Reissue 1984), are set forth in App. D, *infra*.

STATEMENT

In this case, petitioner filed a class action suit in a Nebraska state court on December 17, 1984 challenging the constitutionality of certain "retaliatory taxes" that the State of Nebraska imposed on motor carriers, including petitioner, who operated trucks in Nebraska that were registered in certain other states. The Supreme Court

of Nebraska affirmed a trial court decision declaring that Nebraska's retaliatory taxes violated the Commerce Clause of the United States Constitution, but it held that this violation did not deprive petitioner of personal consitutional "rights" and therefore did not entitle petitioner to relief under 42 U.S.C. § 1983 or to litigation costs and attorneys' fees under 42 U.S.C. § 1988.

A. Nebraska's Retaliatory Taxes

Nebraska, like most other states, imposes a variety of fees and taxes on motor carriers operating in the state, such as fees for the registration of vehicles and taxes for the use of fuel in the state. In addition, until it was recently amended, Neb. Rev. Stat. § 60-305 (Reissue 1984) authorized respondents, various state officials, to levy additional taxes, commonly known as "retaliatory taxes," which were imposed only on carriers operating vehicles in Nebraska that were registered in certain other states and were not imposed on Nebraska-registered vehicles (App. D, *infra*). The purpose of § 60-305 was to retaliate against states imposing so-called "third structure taxes,"[2] which certain states have imposed on all motor carriers operating in those states, including Nebraska-registered carriers, and to which Nebraska objected. Section 60-305 carried out this purpose by authorizing

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[2] A "third structure tax" is one that is imposed on motor carriers in addition to the more traditional charges states have levied on such carriers, which are registration fees and fuel taxes (so-called "first" and "second structure" taxes). Examples of third structure taxes include ton-mile taxes, which are based on the weight of trucks and the mileage operated in the taxing state, and axle taxes, which impose a flat charge based on the number of axles on each vehicle. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court invalidated one such third structure tax, Pennsylvania's axle tax. The Court noted that flat taxes like Pennsylvania's had prompted Nebraska and six other states to enact retaliatory taxes, and it stated: "Such taxes can obviously divide and disrupt the market for interstate transportation services." *Id.* at 285 (footnotes omitted).

respondents to impose taxes on carriers registered in those states that operate in Nebraska which taxes are equal in amount to the third structure tax imposed by the carriers' state of registration. By thus penalizing carriers from third structure tax states, Nebraska's legislature hoped to pressure the legislatures of those states to repeal their third structure taxes or exempt Nebraska-based carriers from them.

Respondents implemented § 60-305 by imposing retaliatory taxes on carriers whose vehicles were registered in nine states: Arizona, Arkansas, Idaho, Nevada, New York, Ohio, Oregon, Pennsylvania and Wyoming (App. 22a).

B. Proceedings Below

Petitioner Mark E. Dennis, doing business as Dennis Trucking, is a motor carrier residing in Royalton, Ohio, who began operating in 1978 with one truck. Petitioner and his wife now own and operate four tractors and six trailers in several states, including Nebraska. His tractors are registered in Ohio, which imposes a two cents per mile third structure tax. Petitioner was therefore subject to and paid Nebraska's retaliatory tax (App. 29a).

Petitioner filed a complaint in a Nebraska state court on December 17, 1984 as a class action seeking injunctive and declaratory relief and refunds.[3] The complaint al-

[3] Petitioner was joined as a plaintiff in his original complaint by the Private Truck Council of America, Inc. ("PTCA") (now the National Private Truck Council, Inc.), a trade association of private motor carriers, many of whose members were subject to Nebraska's retaliatory tax. The trial court, however, dismissed PTCA as a plaintiff on the ground that it lacked standing because it was not itself subject to the tax (App. 33a).

PTCA and other motor carriers that were subject to retaliatory taxes had filed suits in December 1984 and January 1985 against Nebraska and the six other states that had enacted retaliatory motor carrier taxes, Maine, New Hampshire, New Jersey,

leged that Neb. Rev. Stat. § 60-305 (Reissue 1984) discriminated on its face against interstate commerce and out-of-state residents in violation of the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. It also alleged that the respondents were therefore liable to petitioner under 42 U.S.C. § 1983. Upon filing his complaint, petitioner moved for a preliminary injunction or, alternatively, for an order requiring the tax collections to be held in escrow pending the outcome of the suit.[4]

The trial court denied petitioner's motion for a preliminary injunction or an escrow order and his motion for class certification (App. 35a). After a hearing on stipulated facts, the trial court, on September 30, 1987, issued a decision declaring the challenged taxes unconstitutional as an unlawful burden on interstate commerce in violation of the Commerce Clause. The court concluded: "On their face said taxes and fees discriminate against interstate commerce." (*Id.* at 29a). Accordingly, it permanently enjoined respondents from assessing, levying or collecting the taxes (*id.* at 30a). The

Georgia, Florida, and Oklahoma. Each of those actions, except the one in Oklahoma, has resulted in final state court decisions invalidating the taxes. *Private Truck Council of America, Inc. v. Sec'y of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council of America, Inc. v. New Jersey*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988); *Georgia v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. Florida Department of Revenue*, 531 So.2d 367 (Fla. Dist. Ct. App. 1988). A trial court decision upholding Oklahoma's tax in 1987 is pending on appeal before the Oklahoma Supreme Court. *Private Truck Council of America, Inc. v. Oklahoma Tax Commission*, No. CJ-84-9902 (Dist. Ct., Oklahoma Co., O.K. February 6, 1987), *appeal filed*, No. 68,401 (O.K. March 9, 1987).

[4] Escrow orders have often been issued in suits of this kind. Justice Blackmun issued such an order in *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1310 (1987).

court, however, denied without explanation petitioner's claim under 42 U.S.C. § 1983 (*id.* at 30a).

With respect to the entitlement of petitioner and other taxpayers to refunds, the court held that all taxpayers would have to file claims for refunds with the Nebraska Department of Administrative Services (App. 30a). The court also held that petitioner and his attorneys would be entitled to payment of their costs and attorneys' fees under the equitable "common fund" doctrine, but it denied without comment their request for determination that the pertinent common fund would be all the taxes that would be subject to refund as a result of the court's judgment (App. 30a). Since petitioner had paid less than $100 in taxes[5] and since his motion to proceed as a class action had been denied, the court effectively held that there was no common fund from which litigation expenses and attorneys' fees could be recovered.

Petitioner appealed the denial of his claim under 42 U.S.C. § 1983 and the denial of his claim regarding the composition of the common fund. Respondents did not cross-appeal the trial court's invalidation of the tax but did cross-appeal its ruling—albeit a meaningless one—that there was any common fund entitlement to fees and expenses.

On February 16, 1990, the Nebraska Supreme Court affirmed the trial court's denial of petitioner's claim under 42 U.S.C. § 1983, but reversed its holding that petitioner and his attorneys had even a theoretical right to recover fees and expenses under the common fund doctrine (App. 27a). On the latter point, the court held that there was no such right because there was no fund, inasmuch as class certification had been denied and refunds to taxpayers would depend on the filing of individual refund claims and on case-by-case determinations of their merits (*id.* at 26a).

[5] The parties stipulated that petitioner paid a total of $52.60 in retaliatory taxes to Nebraska in 1983 and 1984, the only years covered by the stipulation.

With respect to petitioner's claim under 42 U.S.C. § 1983 the court held:

> Despite the broad language of § 1983 and the fact that there appears to be a division of authority on the question as to whether there is a cause of action under § 1983 for violations of the commerce clause, we believe the better reasoned cases hold that there is no cause of action under § 1983 for violations of the commerce clause.

(App. 5a). The court relied primarily on *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984), which held that "the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments."

REASONS FOR GRANTING THE PETITION

The decision of the Supreme Court of Nebraska presents a question of far-reaching importance: whether or not state violations of the Commerce Clause deprive persons affected by such violations of "rights, privileges or immunities secured by the Constitution," and therefore give rise to liability under 42 U.S.C. § 1983. That is a recurring question as to which the federal courts of appeals and many state courts are sharply divided, and it warrants this Court's review. The Nebraska Supreme Court's conclusion that the Commerce Clause does not secure personal rights conflicts not only with other federal circuit and district court decisions applying 42 U.S.C. § 1983 to Commerce Clause violations but also with decisions of this Court expressly holding that the Commerce Clause does secure personal rights. Indeed, some of this Court's landmark civil rights decisions were based squarely on the Commerce Clause and the rights of persons under that Clause to travel among the states free

of state segregation laws that the Court found to be an undue burden on such interstate travel. *E.g., Bailey v. Patterson*, 369 U.S. 31 (1962); *Morgan v. Virginia*, 328 U.S. 373 (1946). The decision below cannot be squared with those decisions.

I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER 42 U.S.C. § 1983 APPLIES TO VIOLATIONS OF THE COMMERCE CLAUSE

In holding that 42 U.S.C. § 1983 does not provide redress for violations of the Commerce Clause, the Supreme Court of Nebraska acknowledged that there is a division of authority on the question (App. 5a). Its decision agrees with decisions of the Seventh,[6] Eighth,[7] Ninth[8] and Tenth[9] Circuits and a number of state court decisions.[10] All of these rely primarily on the reasoning set forth in the Eighth Circuit's decision in *Consolidated Freightways Corp. v. Kassel* that the Commerce Clause

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[6] *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.*, 826 F.2d 1068 (7th Cir. 1987), *affirming without opinion* 622 F. Supp. 423 (N.D. Ill. 1985).

[7] *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984).

[8] *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989).

[9] *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985).

[10] *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council of America, Inc. v. New Jersey*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988); *American Trucking Associations, Inc. v. Conway*, 146 Vt. 574, 508 A.2d 405 (1986), *cert. denied*, 483 U.S. 1020 (1987); *Private Truck Council of America, Inc. v. Sec'y of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Georgia v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. Florida Department of Revenue*, 531 So.2d 367 (Fla. Dist. Ct. App. 1988).

merely "allocates power between the state and federal governments" and does not secure individual rights.

The decision below, however, conflicts with decisions of the Third, Sixth and Eleventh Circuits. For example, in *Kennecott Corp. v. Smith*, 637 F.2d 181 (3rd Cir. 1980), the Third Circuit squarely held that § 1983 encompasses Commerce Clause claims. The court stated:

> The present action is properly brought under § 1983 because it seeks redress for deprivations of constitutional rights secured by the commerce clause and of federal statutory rights protected by the Williams Act. *See Maine v. Thiboutot*, [448] U.S. [1], 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

637 F.2d at 186 n.5. The same conclusion was reached in *Continental Illinois Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), *vacated on other grounds*, 110 S.Ct. 1249, 58 U.S.L.W. 4330 (1990); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 562 (6th Cir. 1982); *ANR Pipeline Company v. Michigan Public Service Commission*, 608 F. Supp. 43, 48 (W.D. Mich. 1984); and *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-1305 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976). This Court recently reviewed the Eleventh Circuit's decision in *Continental Illinois Corp. v. Lewis*, but found it unnecessary to decide the § 1983 issue because it found that events had mooted the underlying controversy and it therefore vacated the circuit court's decision. 58 U.S.L.W. at 4333.

This conflict among the circuits and the state supreme courts warrants this Court's review. The issue has arisen in many cases in recent years. It is likely to recur in almost every case challenging state laws and actions under the Commerce Clause and may also arise with respect to other constitutional provisions to which the rationale of the court below could be extended. This case presents the issue squarely and is an appropriate case in which to consider and resolve the issue.

II. THE DECISION OF THE NEBRASKA SUPREME COURT THAT THE COMMERCE CLAUSE DOES NOT SECURE PERSONAL RIGHTS IS CONTRARY TO NUMEROUS DECISIONS OF THIS COURT

The conclusion of the court below and other courts that the Commerce Clause does not establish personal rights that may be redressed under § 1983 is also directly in conflict with decisions of this Court applying the Commerce Clause, and it would have anomalous and far-reaching consequences. While the underlying purpose of the Commerce Clause is to "create an area of free trade among the several States," *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944), this Court has made clear that it does so by creating personal rights, which individuals may enforce, to be free of discriminatory and excessive taxation and regulatory burdens imposed by state governments. In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977), for example, the Court held that certain stock exchanges had standing to challenge a New York tax that discriminated against them and their members, stating (emphasis supplied): "The Exchanges are asserting *their right under the Commerce Clause* to engage in interstate commerce free of discriminatory taxes on their business . . . ." Similarly, in *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Court stated: "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Western Union Tel. Co. v. State of Kansas*, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355." In these and many other cases, the Court has used and understood the term "right" to mean any legal privilege or protection which a person may enforce by judicial action.

The personal nature of the rights secured by the Commerce Clause is perhaps most dramatically illustrated by this Court's landmark civil rights decision which struck down racially discriminatory state laws as violations of

the Commerce Clause. In *Morgan v. Virginia*, 328 U.S. 373 (1946), the Court upheld an individual passenger's Commerce Clause challenge to a Virginia statute requiring racial segregation on interstate buses. Significantly, the Court rejected a challenge to the passenger's standing to invoke the Commerce Clause; the Court stated:

> We think . . . that the appellant is a proper person to challenge the validity of this statute as a burden on commerce . . . . *Constitutional protection against burdens on commerce is for her benefit* on a criminal trial for violation of the challenged statute.

Id. at 376-377 (emphasis supplied, footnote omitted). *Accord*, *Bailey v. Patterson*, 369 U.S. 31 (1962). *See also Edwards v. California*, 314 U.S. 160 (1941), and *United States v. Guest*, 383 U.S. 745, 757-760 (1966), recognizing a "constitutional right to travel from one State to another" based on the Commerce Clause. Although they were cited to it, the court below made no reference in its opinion to the foregoing decisions of this Court, and its ruling that the Commerce Clause does not secure personal rights simply cannot be reconciled with those decisions.

Furthermore, contrary to the conclusion of the court below and other courts that have adopted the rationale of the Eighth Circuit in *Consolidated Freightways Corp. v. Kassel*, there is simply no rational or workable principle upon which constitutional provisions can be divided among those that create "individual rights" on the one hand and those that, in the words of the Eighth Circuit, merely "allocate[] power between the state and federal governments."[11] If accepted, the rationale of the court below and the Eighth Circuit could be extended to a host of constitutional provisions including, for example, all of the powers of Congress in Article I, Section 8 and all of the restrictions in Article I, Section 10 upon states, such as those prohibiting bills of attainder, ex post facto laws,

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[11] *Consolidated Freightways Corp. v. Kassel*, 730 F.2d at 1144.

laws impairing contracts, and duties on exports and imports. Taking this purported distinction to its logical conclusion could even lead to the determination that the First and Fourteenth Amendments create no "individual rights" redressable by § 1983 because they are phrased in terms of limitations on the powers of the federal and state governments.[12]

To petitioner, his right under the Commerce Clause to conduct his trucking business among the several states free from discriminatory or unduly burdensome state laws is as vital as any other right the Constitution secures to him. His livelihood depends on it.

III. WHETHER 42 U.S.C. § 1983 APPLIES TO COMMERCE CLAUSE VIOLATIONS IS EXTREMELY IMPORTANT TO THE EFFECTIVE ENFORCEMENT OF THAT CLAUSE, AS THIS CASE ILLUSTRATES

The issue in this case is also extremely important for the effective enforcement of the Commerce Clause, particularly in cases like this one. Its principal importance relates to the ability of persons who have been injured by

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[12] The court below and the Eighth Circuit in *Kassel* erroneously analogized the Commerce Clause to the Supremacy Clause. The Supremacy Clause, however, is very different from the Commerce Clause, and indeed, from any other provision of the federal Constitution. The Supremacy Clause is merely a declaration of the supremacy of the federal Constitution and federal laws over state laws; as this Court noted in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979), it is not itself "a source of any federal rights." *See also Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444, 58 U.S.L.W. 4033 (1989). The Commerce Clause, in contrast, clearly *is* a "source of . . . federal rights" which individuals may enforce, and in that respect it is no different from the Ex Post Facto Clause or the Bill of Attainder Clause or any other substantive limitation on the power of states contained in the Constitution. Since those are all limitations that individuals may personally enforce by judicial action, each of those clauses can only be regarded as establishing personal constitutional "rights."

the violation of their rights under the Commerce Clause to recover litigation expenses and attorneys' fees under 42 U.S.C. § 1988, the attorneys' fees counterpart to § 1983. If such persons are entitled to injunctive relief or damages under § 1983 against the responsible state officials, they would ordinarily be entitled to recover attorneys' fees and litigation expenses from the entities whom those officials represent, even if relief were actually awarded on another ground. *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980); *Hutto v. Finney*, 437 U.S. 678, 693-694 (1978).[13]

When Congress enacted § 1988 in 1976, it recognized that the ability of plaintiffs to recover litigation costs and attorneys' fees is often essential to the effective pro-

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[13] In *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), the Court held that neither states nor state officials sued in their official capacities for money damages are "persons" that are subject to suit under § 1983. The Court, however, also stated: "Of course, a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" 109 S.Ct. at 2311 n.10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167, n.14 (1985)). The Court has also held that attorneys' fees under § 1988 may be recovered from a state or state agency in actions for injunctive relief against state officials. *Hutto v. Finney*, 437 U.S. 678 (1978). In this case, petitioner sued respondents' predecessors in their official capacities and sought and obtained injunctive relief against them.

Since the action sought prospective relief against state officials acting in their official capacities, this case does not present the question of whether a state may assert sovereign immunity against a § 1983 action, which is the question under review in *Howlett v. Rose*, 537 So.2d 706 (Fla. Dist. Ct. App.), *review denied*, 545 So.2d 1367 (Fla. 1989), *cert. granted*, 110 S.Ct. 403 (1989) (No. 89-5383), argued March 20, 1990. Moreover, Nebraska has never asserted sovereign immunity against § 1983 actions in its own courts. On the contrary, its decisions recognize such actions. *See Maldonado v. Nebraska Department of Public Welfare*, 223 Neb. 485, 391 N.W.2d 105, 109-110 (1986).

tection of their constitutional rights. In *Maine v. Thiboutot*, this Court noted that "Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain' compliance with § 1983. S. Rep. No. 94-1011, p. 5 (1976)." 448 U.S. at 11. *See also Hutto v. Finney*, 437 U.S. at 694. Furthermore, Congress enacted § 1988 in recognition of the fact that parties who bring suit under § 1983 and prevail are typically seeking not only to redress their own injuries but also to vindicate important civil and constitutional rights of many other people and the public at large. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986). As the House Report accompanying § 1988 noted, a person who obtains injunctive relief under § 1983 " 'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.' " H.R. Rep. No. 94-1558, p. 2 (1976) (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

Section 1988 is no less important in vindicating the vital public and national interests in the free flow of interstate commerce, and the policies underlying § 1988 are fully applicable to Commerce Clause cases like this one. In many cases, including this one, a state tax, regulation or practice that violates the Commerce Clause will impose a cost on persons and companies that is substantially less, in the case of even the largest companies, than the expense would be of bringing a lawsuit to challenge it. If, as in this case, the state's procedures do not permit a class action, the prospect of recovering expenses and attorneys' fees under 42 U.S.C. § 1988 will be the only practical means of bringing suit to invalidate and enjoin the tax.

If recovery under § 1988 is denied, the result in this case will be to impose on petitioner and his attorneys the entire cost of bringing and prosecuting an action that succeeded in striking down an unconstitutional tax

and saving thousands of interstate motor carriers millions of dollars. Faced with that outcome, few persons would bring such actions in the future. The substantial costs and burdens of litigation would thus serve as an effective deterrent to judicial challenges to laws of states like Nebraska that discriminate against or otherwise unduly burden interstate commerce, contrary to the interests of the nation as a whole.[14]

In addition to precluding recovery of costs and attorneys' fees, denial of a Commerce Clause claim under § 1983 would also preclude recovery of damages from persons acting under color of state law in cases where such damages would be appropriate—for example, where the defendants had acted in bad faith and therefore had no qualified immunity from personal liability for damages. If, for example, state or local officials followed a policy of subjecting interstate travellers or merchants to harassment on the basis of their race, or state of origin, or the state of origin of their commodities, the victims of such treatment would, under the ruling of the Nebraska Supreme Court have no entitlement to damages under § 1983 even though the conduct clearly contravened the Commerce Clause under this Court's rulings. *See, e.g., Morgan v. Virginia*, 328 U.S. 373 (1946); *United States v. Guest*, 383 U.S. 745 (1966). That result, petitioner submits, has no basis in § 1983. It presents, in any event, an important question warranting this Court's review.

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[14] In some cases, of course, associations of taxpayers or of other victims of unconstitutional state action may fund litigation challenging unconstitutional state taxes or other laws. In other cases, there may not be associations with sufficient resources to do so. In the case of PTCA's litigation against retaliatory taxes, PTCA was able to undertake that effort only because its attorneys were willing to represent the plaintiffs on a contingent fee basis. Even where associations or others fund the litigation, Congress enacted § 1988 to impose those expenses on the party whose unconstitutional acts gave rise to the expenses rather than on the victims of those acts or their representatives.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Nebraska should be granted.

Respectfully submitted,

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April 5, 1990

APPENDICES

APPENDIX A

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

MARK E. DENNIS, doing business as DENNIS TRUCKING,
Appellant and Cross-Appellee,

v.

STATE OF NEBRASKA, *et al.*,
Appellees and Cross-Appellants.

Case Caption

DENNIS v. STATE

Filed February 16, 1990. No. 88-205

Appeal from the District Court for Lancaster County: Bernard J. McGinn, Judge. Affirmed in part, and in part reversed.

Richard A. Allen and Richard P. Schweitzer, of Zuckert, Scoutt & Rasenberger, and Richard L. Spangler, of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder for appellees.

1. Constitutional Law: Civil Rights: Actions. There is no cause of action under 42 U.S.C. § 1983 (1982) for violations of the commerce clause.

2. Constitutional Law: Statutes. The purpose of the privileges and immunities clause is to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed.

3. ——: ——. Statutes which do not make a distinction based upon residence or citizenship do not violate the privileges and immunities clause.

4. Attorney Fees. Where one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.

5. ——. The common fund must be an immediate fund from which attorney fees may be awarded at trial.

6. ——. The common fund theory requires for an award of attorney fees under the common benefit rationale (1) as ascertainable class of beneficiaries, easly identifiable, and (2) a source of funds common to the class from which the award can be made.

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, and Grant, JJ.

BOSLAUGH, J.

The plaintiff, Mark E. Dennis, doing business as Dennis Trucking, commenced this action to obtain a judgment declaring taxes imposed pursuant to Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984) to be unconstitutional and enjoining the defendants from assessing or collecting such taxes, and to recover the plaintiff's attorney fees and costs of the action. Named as defendants were the State of Nebraska; Holly Jensen, individually and as director of the Nebraska Department of Motor Vehicles; Lou Lamberty, individually and as director of the Nebraska Department of Roads; and Kay Orr, individually and as Nebraska Treasurer.

The plaintiff alleged that the taxes and fees imposed under §§ 60-305.02 and 60-305.03 were an unlawful burden on interstate commerce in violation of U.S. Const. art. I, § 8, cl. 3; constituted a denial of the plaintiff's privileges and immunities in violation of U.S. Const. art. IV, § 2, cl 1; constituted a grant by the Legislature of special and exclusive privileges, immunities, and franchises in violation of Neb. Const. art. III, § 18; and violated 42 U.S.C. § 1983 (1982) by depriving the plaintiff of rights secured by the U.S. Constitution.

After a trial to the court on stipulated facts, the trial court held that the statutes were in violation of the commerce clause, U.S. Const. art. I, § 8, cl. 3, and permanently enjoined the defendants from assessing, levying, or collecting taxes or fees pursuant to §§ 60-305.02 and 60-305.03. The trial court dismissed the remaining counts, holding that the plaintiff had failed to prove he was entitled to judgment under U.S. Const. art. IV, § 2, cl. 1; Neb. Const. art. III, § 18; or 42 U.S.C. 1983.

The order of the trial court further provided:

> The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees. The Court shall determine the amount of any such expenses and fees by subsequent order following the submission of documentation in support thereof and a showing regarding any fund available for payment of said fees and expenses."

The plaintiff's motion for new trial, which was overruled, alleged that the common fund from which his attorneys' costs and fees may be paid was the total amount of taxes available for refunds pursuant to the court's order.

The plaintiff has appealed, contending that the district court erred in denying his claims under 42 U.S.C. § 1983 and in denying his claim that the common fund from which litigation costs and attorney fees may be paid consists of the total amount of taxes subject to refund as a result of the court's holding. The defendants have cross-appealed, claiming that the trial court erred in finding that the plaintiff and his attorneys were entitled under the equitable fund doctrine to payment of their expenses and reasonable fees. The defendants have not appealed the district court's finding that the statutes were in violation of the commerce clause, and there is no issue in that regard on this appeal. Both sections have since been amended. See §§ 60-305.02 and 60-305.03 (Reissue 1988).

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), provides that attorney fees may be awarded to the prevailing party, other than the United States, in any action to enforce a provision of § 1983. Furthermore, a party who prevails on a ground other than § 1983 is entitled to attorney fees under § 1988 if § 1983 would have been an appropriate basis for relief. *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied* 469 U.S. 834, 105 S. Ct. 126, 83 L. Ed. 2d 68; *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), *cert. denied*, 476 U.S. 1129, 106 S. Ct. 1997, 90 L. Ed. 2d 677.

The issues presented by the plaintiff's first assignment of error are, therefore, (1) whether a violation of the commerce clause constitutes a cause of action under § 1983 and (2) whether § 1983 would have been an appropriate basis for relief in this case.

Despite the broad language of § 1983 and the fact that there appears to be a division of authority on the question as to whether there is a cause of action under § 1983 for violations of the commerce clause, we believe the better reasoned cases hold that there is no cause of action under § 1983 for violations of the commerce clause. The leading authority appears to be *Consol. Freightways Corp. of Del. v. Kassel, supra*, in which the court held that "the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments." *Id.* at 1144. Cases involving the supremacy clause and reaching the same result are *Golden State Transit Corp. v. City of Los Angeles*, —— U.S. ——, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989) (the supremacy clause, of its own force,

does not create rights enforceable under § 1983); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S. Ct. 1905, 60 L. Ed. 2d 508 (1979); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1987) (preemption of state law under the supremacy clause does not give rise to a cause of action under § 1983); *Gould, Inc. v. Wisconsin Dept. of Industry, Labor*, 750 F.2d 608 (7th Cir. 1984), *aff'd* 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986) (action brought by corporation alleging that state statutes were preempted by federal labor law, in violation of the supremacy clause, was not cognizable under § 1983); and *Maryland Pest Control v. Montgomery County, Md.*, 884 F.2d 160 (4th Cir. 1989) (the supremacy clause does not secure rights within the meaning of § 1983 so as to entitle a successful litigant to attorney fees pursuant to § 1988).

In *Consol. Freightways Corp. of Del. v. Kassel, supra*, Consolidated Freightways sought attorney fees under 42 U.S.C. § 1983 after Iowa's statute restricting Consolidated's use of 65-foot twin trailers was declared invalid as a violation of the commerce clause. The U.S. Court of Appeals for the Eighth Circuit held that a violation of the commerce clause did not constitute a claim under § 1983.

> Iowa contends that the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments. On the basis of the nature of the Commerce power as defined by the case law . . . we must agree with the interpretation of the Commerce Clause as an allocating provision, not one that secures rights cognizable under § 1983.
>
> The Commerce Clause grants to Congress the power to regulate interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). That grant of power has been held to imply a limitation upon the states. [Citations omitted.]

> It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and state interests, not the protection of individual rights. These decisions are replete with references to the *national* or *federal interest* in preventing the burdensome state regulation of interstate commerce. [Citations omitted.]
>
> In the Supreme Court's opinion in this very case the emphasis is on the role of the Commerce Clause in preventing state regulation from "trespass[ing] upon *national interests.*" *Kassel v. Consolidated Freightways*, 450 U.S. 662, 669, 101 S.Ct. 1309, 1315, 67 L.Ed.2d 580 (1981) (emphasis added). In striking down the Iowa truck-length limitations, the Court stated that Iowa's "regulations impair significantly the *federal interest* in efficient and safe interstate transportation . . . ." *Id.* at 671, 101 S.Ct. at 1316 (emphasis added). No where does the Court refer to the impairment, infringement, or protection of the interests or rights of the individual. Throughout the Commerce Clause cases the emphasis is on the relationship between conflicting federal and state interests, not the relationship between the individual and the state. [Citation omitted.]
>
> To support its theory that the Commerce Clause secures rights cognizable under § 1983, Consolidated has cited several Supreme Court cases which refer to a Constitutional "right" to engage in interstate commerce. . . . Although these cases do refer to engaging in interstate commerce as a constitutional right, such cases were not dealing with the question of whether the Commerce Clause secures individual rights within the meaning of § 1983. In *Garrity* [*v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967),] the reference to interstate commerce was mere dictum, and in both *Western Union* [*Tel. Co. v.*

Kansas, 216 U.S. 1, 30 S. Ct. 190, 54 L. Ed. 355 (1910),] and *Crutcher* [*v. Kentucky*, 141 U.S. 47, 11 S. Ct. 851, 35 L. Ed. 649 (1891)], the focus of the Court's opinions was on the separation of powers between the national and state legislatures. Despite these references to a right to engage in interstate commerce, we agree with the district court that the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy. [Citation omitted.]

Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of § 1983.

(Emphasis in original.) *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1144-45 (8th Cir. 1984). The court concluded:

In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), Justice Douglas discerned three purposes underlying the original enactment of § 1983: (1) to override discriminatory state laws; (2) to provide a remedy where state law was inadequate; and (3) to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice. [Citation omitted.] To hold that an alleged violation of the Commerce Clause constitutes an action cognizable under § 1983 would fail to serve any of these purposes and would be an unwarranted extension of the Civil Rights Act. We do not believe that such a cause of action was within the intent of the Congress that enacted the civil rights statutes, nor do we believe that such an interpretation of the scope of § 1983 is mandated by either

the language of § 1983 or the nature of the Commerce Clause. We therefore hold that § 1983 does not provide a remedy for a dormant Commerce Clause claim.

730 F.2d at 1146-47.

In *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989), the plaintiffs brought a § 1983 action against members of the Nevada Gaming Control Board after the board refused to extend further licensing to the plaintiffs when their 1-year limited gaming licenses expired. The plaintiffs alleged their civil rights had been violated because they had been deprived of protected property and liberty interests without due process of law.

The U.S. Court of Appeals for the Ninth Circuit held that the corporate plaintiffs had no protected property interests in further licensing and could not state a claim under § 1983 for an alleged violation of the commerce clause. The plaintiffs also failed to establish a protected interest in reputation. Since they had no protected property or liberty interests, the plaintiffs could not show that their due process rights had been violated. The court further held that the denial of the license application, based partly on individual plaintiff Kraft's personal association with an unsuitable person, did not violate Kraft's free association right.

The plaintiffs in *Kraft* also alleged that the board violated their constitutional rights by issuing a stop order as to an out-of-state sale of corporate securities, contending that the board's action deprived them of corporate property in violation of the commerce clause and, thus, in violation of § 1983. The court rejected this contention.

The Commerce Clause places restraints upon the power of the states. *Philadelphia v. New Jersey*, 437 U.S. 617, 623, 98 S. Ct. 2531, 2535, 57 L.Ed.2d 475 (1978). It divides power between the states and the federal government. We have previously stated that

> "§ 1983 was not intended to encompass those constitutional provisions which allocate power between the state and federal government." *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1984) (Supremacy Clause, which establishes federal-state priorities, does not secure individual rights under § 1983), *cert. denied*, 479 U.S. 1060, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *see also Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir. 1984) (The Commerce Clause is "an allocating provision, not one that secures rights cognizable under § 1983."), *cert. denied*, 469 U.S. 834, 105 S.Ct. 126, 83 L.Ed.2d 68 (1984). Thus, assuming that the Board's actions in any way implicated the Commerce Clause, the plaintiffs cannot state a cause of action under § 1983 for violation of the Clause.

872 F.2d at 869.

In *J & J Anderson v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985), the board of trustees of the town of Erie, Colorado, enacted an ordinance prohibiting any ultralight aircraft from landing or taking off within the town. The ordinance was enacted in response to noise complaints. The plaintiffs, an ultralight aircraft company and three pilots, brought a § 1983 action alleging that the ordinance denied them their rights to equal protection and constituted a "taking" of their rights to carry on a lawful occupation, to own and enjoy private property, and of freedom of transit through navigable airspace pursuant to 49 U.S.C. app. § 1304 (1982), in violation of the just compensation clause of the fifth amendment.

Although the issues between the parties were ultimately resolved by the repeal of the ordinance, the plaintiffs requested costs and attorney fees pursuant to 42 U.S.C. § 1988. The plaintiffs argued that they would have substantially prevailed on their § 1983 claim because

certain federal regulations preempted the effect of the ordinance. The U.S. Court of Appeals for the Tenth Circuit stated:

> The Commerce Clause does, by implication, limit state and municipal authority to enact laws regulating interstate commerce. . . . However, it has been recognized that when a compelling public interest, such as community safety, is involved, the states and municipalities have a legitimate local concern which may be regulated by a zoning ordinance, notwithstanding the fact that such ordinance affects interstate commerce. . . .
>
> The Commerce Clause of the Constitution, Art .1, § 8, cl. 3, is a limitation upon the power of the states to regulate commerce. However, state regulations touching upon safety may be valid if they do not place a substantial burden on interstate commerce. . . . . In any event, the Commerce Clause deals with the relationship between national and state interests, and does not deal with the protection of individual rights. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959). The Commerce Clause does not secure rights cognizable under 42 U.S.C. § 1983 in that a Commerce Clause violation would not deprive an individual of any right, privilege, or immunity secured by the Constitution. *Consolidated Freightways Corp. of Delaware v. Kassel, supra*, 730 F.2d at 1144. Accordingly, the Court there held that the claim for attorney's fees pursuant to 42 U.S.C. § 1988 was not well taken.

767 F.2d at 1476. The court held:

> The Commerce Clause and the Supremacy Clause, although limiting the power of the states to inter-

> fere in areas of national concern, do not secure rights cognizable under § 1983. This section was enacted to insure a "right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted thereto." *Chapman v. Houston Welfare Rights Organization*, *supra*, 441 U.S. at 611, 99 S.Ct. at 913. Thus, § 1983 does not provide a remedy for claims resulting from violations of the Commerce Clause or the Supremacy Clause. It follows that an attorney's fee claim under § 1988, based on a § 1983 action involving an alleged violation of the Commerce Clause and the Supremacy Clause of the Constitution of the United States, can have no merit.

767 F.2d at 1476-77. The court further found that the plaintiffs could not have substantially prevailed on their § 1983 "taking" claim and were not entitled to attorney fees pursuant to § 1988.

In *Pesticide Public Policy v. Village of Wauconda*, 622 F. Supp. 423 (N.D. Ill. 1985), *aff'd* 826 F.2d 1068 (7th Cir. 1987), the plaintiff foundation challenged the validity of an ordinance regulating the use of pesticides in the defendant village. The foundation claimed that the village lacked authority to enact the ordinance and that the ordinance was preempted by Illinois law. The foundation further claimed that the ordinance denied foundation members due process and equal protection of law, constituted special legislation, and violated the commerce clause of the U.S. Constitution. The foundation also contended that the village was liable to individual foundation members for money damages pursuant to § 1983.

The court held that Illinois state law preempted the village's regulation of pesticides. The ordinance, therefore, was invalid under Illinois law.

As to § 1983 liability, the court held that the foundation did not have standing to sue for a declaration that its members were entitled to damages. The court found

that, even if the foundation had standing, damages were not available as a matter of law under any of the foundation's § 1983 claims:

> Section 1983 was enacted to override discriminatory state laws and provide a remedy where state law was inadequate or unenforced. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The appellate courts reasoned that the function of both the Supremacy Clause and the Commerce Clause relates not to individual rights, but rather to the distribution of power between the state and federal governments. "Both the Supremacy and Commerce Clauses 'limit the power of a state to interfere with areas of national concern.'" *Gould, [Inc. v. Wisconsin Dept. of Industry, Labor*, 750 F.2d 608, 616 (7th Cir. 1984), quoting *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984).] Thus, the Seventh Circuit declined to award attorneys' fees under 42 U.S.C. § 1988 based solely on Gould's success on its federal preemption claims, just as the Eighth Circuit refused to award attorneys' fees based on a Commerce Clause violation.
>
> Therefore, even if the Foundation succeeded on its federal preemption claim, Count I, that would not entitle it to a declaration that the Village is liable for damages under Section 1983. Likewise, Count V of the complaint, which alleges that the Wauconda ordinance violates the Commerce Clause, does not provide a basis for damages under Section 1983.

622 F. Supp. at 435-36.

The court further held that the ordinance did not deprive foundation members of equal protection of the laws or violate the Illinois Constitution's prohibition against special legislation.

In *Private Truck Council v. Secretary of State*, 503 A.2d 214 (Me. 1986), a class action was brought by and

on behalf of out-of-state truckers, contesting the validity of Maine's reciprocal truck taxes. An escrow fund comprised of all moneys collected under the disputed statute after January 2, 1985, was established during the pendency of the action. The trial court found that the statute was in violation of the commerce clause, but refused to order any refund of tax moneys "except to the extent that the plaintiff class had been protected by [the] escrow arrangement . . . ." *Id.* at 216. The trial court also denied the plaintiffs' request for allowance of attorney fees. The State appealed the trial court's action in declaring the statute unconstitutional. The plaintiffs also appealed, contending that their relief should not be limited to reimbursement of the funds in escrow and that they were entitled to recover attorney fees pursuant to § 1988 because they brought their action alternatively under § 1983.

In affirming the decision of the trial court, the Supreme Judicial Court of Maine held that the statute was in violation of the commerce clause and determined that the trial court properly ordered a refund of only the moneys held in escrow. The court further held that the plaintiffs were not entitled to recover attorney fees pursuant to § 1988.

> [P]laintiffs failed . . . to state a claim for relief cognizable under section 1983. We are convinced that Congress never intended to make a violation or the Commerce Clause actionable under that section of the Civil Rights Act. The Eighth Circuit has so held in a well-reasoned opinion in *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, [469 U.S. 834], 105 S.Ct. 126, 83 L.Ed.2d 68 (1984). Although the United States Supreme Court has not addressed this issue so far as the Commerce Clause is concerned, it did hold in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), that the

> Supremacy Clause does not give rise to a claim of right "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3), a jurisdictional counterpart to section 1983. *Id.* at 615, 99 S.Ct. at 1914. *See also Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations*, 750 F.2d 608, 616 (7th Cir. 1984) (Supremacy Clause violation does not present a cognizable claim under section 1983).

503 A.2d at 221. The court adopted the reasoning of *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), and stated:

> We find unpersuasive, as did the Eighth Circuit, two earlier federal cases stating terse holdings going the other way. *Kennecott Corp. v. Smith*, 637 F.2d 181, 1[illegible] n.5 (3d Cir. 1980); *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1304-05, (D.Mont. 1975), *aff'd*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Neither of those cases analyzed the merits of extending section 1983 to encompass violations of the Commerce Clause, but rather merely relied on generalized statements in Supreme Court cases that did not involve the Commerce Clause issue. *Consolidated Freightways*, 730 F.2d at 1142-43.

503 A.2d at 222.

In *Private Truck Council of America v. State*, 128 N.H. 466, 517 A.2d 1150 (1986), the New Hampshire Supreme Court held that a state statute imposing taxes and fees on motor carriers whose vehicles were registered in nine other states discriminated against interstate commerce, in violation of the commerce clause. The court also determined that the plaintiffs (which were corporations) had not been properly certified as a class and, therefore, could not invoke the protection of the privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1.

The court held that the plaintiffs were not entitled to tax refunds or attorney fees pursuant to § 1988:

> The purposes underlying the original enactment of section 1983 were to override discriminatory state laws, to provide a remedy where state law was inadequate, and to provide a federal remedy where the state remedy, although adequate in theory, was unavailable in practice. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), *overruled on other grounds*, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Although the plaintiffs argue that section 1983 provides redress for "any" violation of constitutional or federal statutory rights, section 1983 has not been so construed. *See Chapman v. Houston Welfare Rights Organization*,, 441 U.S. 600, 615-20 (1979) (supremacy clause violation not redressable under § 1983); *Poirer v. Hodges*, 445 F. Supp. 838, 842 (M.D. Fla. 1978) (contract clause violation not redressable under § 1983.
>
> We do not believe that the purposes of section 1983 would be furthered by a holding that a violation of the commerce clause is redressable through an action under that statute. The United States Court of Appeals for the Eighth Circuit has held that a violation of the commerce clause is not a basis for applying section 1983. *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 105 S.Ct. 126 (1984);,*see also Private Truck Council v. Secretary of State*, 503 A.2d at 220-22. *But see Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980); *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-05 (D. Mont. 1974), *aff'd on other grounds*, 425 U.S. 463 1976). The Eighth Circuit based its holding on the ground that the commerce clause does not establish individual rights, but rather allocates power between State and federal governments. *Kassel*, *supra* at 1144.

> Both the Commerce Clause and the Supremacy Clause "limit the power of a state to interfere with areas of national concern. Just as the Supremacy Clause does not secure rights within the meaning of § 1983, neither does the Commerce Clause." *Kassel*, 730 F.2d at 1144 (footnote omitted). "The Commerce Clause created no rights or privileges; it established no law other than the law of jurisdiction to regulate those engaged in interstate or foreign commerce." *Id.* at 1145 (quoting B. GAVIT, COMMERCE CLAUSE, 32-33 (1932)). The Eighth Circuit concluded that "[a]lthough individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a 'right' secured by the Constitution within the meaning of § 1983." *Id.*
>
> We agree that a commerce clause violation is not redressable under section 1983. We therefore deny the plaintiffs' claims for refunds of taxes paid before the establishment of the escrow fund. The plaintiffs' claims for attorney's fees also must fail. The plaintiffs have not stated a cause of action under section 1983, and thus cannot recover attorney's fees under 42 U.S.C. § 1988 (1982), which provides for attorney's fees in, *inter alia*, section 1983 actions.

128 N.H. at 476-77, 517 A.2d at 1157.

In *Private Truck Council v. State*, 221 N.J. Super. 89, 534 A.2d 13 (1987), *aff'd* 111 N.J. 214, 544 A.2d 33 (1988), the plaintiffs challenged the constitutionality of a retaliatory tax imposed on certain trucking operations, claiming that New Jersey's Counterpart Fee Act violated the commerce clause and the privileges and immunities clause of the U.S. Constitution. The plaintiffs also contended that they were entitled to refunds of the moneys unlawfully collected, as well as counsel fees and costs under § 1983.

The appellate division of the New Jersey Superior Court determined that the tax was in violation of the commerce clause and found that the plaintiffs were entitled to refunds from the date their complaint was filed. The court did not consider the merits of the plaintiffs' claim that the act was unconstitutional under the privileges and immunities clause. With respect to the plaintiffs' request for counsel fees, the court held:

> [I]t is sufficient to note that 42 *U.S.C.* § 1983 was not intended to apply to this type of action. *See Consol. Freightways Corp. of Del. v. Kassel*, 730 *F.*2d 1139, 1145-1147 (8th Cir. 1984), *cert.* den. 469 *U.S.* 834, 105 *S.Ct.* 126, 83 *L.Ed.*2d 68 (1984); *Private Truck Council v. Secretary of State*, [505 A.2d] at 220-222; *Private Truck Council of America v. State*, [128 N.H. at 466,] 517 A.2d at 1156-57.

221 N.J. Super. at 97, 534 A.2d at 18.

Finally, in *State of Ga. v. Private Truck Council &c.*, 258 Ga. 531, 371 S.E.2d 378 (1988), the Supreme Court of Georgia held that state statutes imposing highway user taxes on vehicles registered in certain states unconstitutionally discriminated against interstate commerce. The court, however, held that the plaintiffs were not entitled to attorney fees under § 1988.

> We agree with the state that plaintiffs may not recover attorney fees under 42 USC § 1988 for the Commerce Clause violation in this case. *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F2d 1139 (8th Cir. 1984); *Private Truck Council of America, Inc. v. Secretary of State*, 503 A2d, supra; *Private Truck Council of America, Inc. v. State of New Hampshire*, 517 A2d, supra.

258 Ga. at 535, 371 S.E.2d at 381.

In addition to his commerce clause claim, the plaintiff further alleged that §§ 60-305.02 and 60-305.03 (Reissue

1984) were in violation of the privileges and immunities clause, U.S. Const. art. IV, § 2, cl. 1, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Section 1983 embodies individual rights cognizable under the privileges and immunities clause. *Intern. Organization of Masters, Etc. v. Andrews*, 831 F.2d 843 (9th Cir. 1987).

In his second amended petition the plaintiff alleged:

> 2. Plaintiff Mark E. Dennis owns and operates Dennis Trucking, a sole proprietorship with its principal place of business in Ohio. He is an owner of a nonresident vehicle for purposes of the taxes and fees imposed under Sections 60-305.02 and 60-305.03, which vehicle is duly authorized to operate in the State of Nebraska.
>
> . . . .
>
> 13. Plaintiff Mark E. Dennis owns one vehicle, which is registered in the State of Ohio. . . .
>
> . . . .
>
> 17. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.03 constitute a denial of the privileges and immunities of the plaintiff, whose vehicle is registered outside the State of Nebraska, because they are imposed based on the taxpayer's residence in another state. No comparable tax is imposed on residents of Nebraska. Accordingly, these taxes discriminate against nonresidents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution.

The trial court resolved this issue against Dennis.

In considering a statute challenged on the basis of the privileges and immunities clause, a distinction must be made based upon residence or citizenship.

The plaintiff operates one tractor and two trailers in interstate commerce. Since his tractor is registered in Ohio, he is subject to taxation under §§ 60-305.02 and 60-305.03 when he operates in Nebraska. Pursuant to a reciprocity agreement between Nebraska and Ohio, owners of vehicles which are registered in Ohio are granted full license reciprocity for interstate movement in Nebraska and pay no registration fees to Nebraska; however, when operating in Nebraska, owners of such vehicles must pay a fee of 1 to 2 cents per mile. This fee mirrors a like charge imposed by Ohio on owners of Nebraska-registered vehicles which operate in Ohio.

The purpose of the privileges and immunities clause "is to outlaw classifications based on the fact of noncitizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Toomer v. Witsell*, 334 U.S. 385, 398, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). The clause "'does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.'" *Hicklin v. Orbeck*, 437 U.S. 518, 525, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), quoting *Toomer v. Witsell*, *supra*. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 383, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978). "The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." *Austin v. New Hampshire*, 420 U.S. 656, 662, 95 S. Ct. 1191, 43 L. Ed. 2d 530 (1975).

Section 60-305.02 provided:

> *Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska,* entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks . . . and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks . . . owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, *in which such trucks . . . are domiciled,* grant reciprocity comparable to that extended by the laws of Nebraska.

(Emphasis supplied.)

Section 60-305.03 provided:

> (1) In case a foreign state . . . is not reciprocal as to license fees on commercial trucks . . . the owners of such *nonresident vehicles* from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks . . . other than license fees, and the reciprocity law of any other foreign state . . . does not act to exempt Nebraska trucks . . . operating in that state from payment of all fees whatsoever, the owners of such *foreign trucks* . . . shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks . . . .
>
> . . . .
>
> (7) Properly registered shall mean a vehicle licensed or registered in one of the following: . . . (b) *the jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently*

> *dispatched, garaged, serviced, maintained, operated, or otherwise controlled, and the vehicle is assigned to such principal place of business . . . .*

(Emphasis supplied.)

The plaintiff contends that because § 60-305.03 imposes taxes only upon " 'the owners of . . . nonresident vehicles,' " and not on residents of Nebraska, the challenged taxes and fees "clearly deny the former substantial equality of treatment with the latter." Brief for appellant at 26. The taxation imposed pursuant to §§ 60-305.02 and 60-305.03 is not related to the resident or nonresident status of the motor carrier, but is based upon the state where the particular vehicle is registered. If a citizen of Nebraska owned a vehicle registered in a state which imposed third-structure taxes on vehicles registered in Nebraska (i.e., Arkansas, Arizona, Idaho, Wyoming, New York, Pennsylvania, Oregon, Nevada, or Ohio), the Nebraska citizen would be subject to retaliatory taxation pursuant to §§ 60-305.02 and 60-305.03. In this respect, the owners of foreign-registered vehicles who are not citizens or residents of Nebraska are treated no differently from the owners of foreign-registered vehicles who are citizens of Nebraska. Since the statutes do not make a distinction based upon residence or citizenship, the statutes do not violate the privileges and immunities clause.

Furthermore, only an out-of-state citizen has standing to bring a challenge under the privileges and immunities clause. See *Bradwell v. The State*, 83 U.S. (16 Wall.) 130 (1872); *White v. Thomas*, 660 F.2d 680 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S. Ct. 1731, 72 L. Ed 2d 148 (1982). The second amended petition does not allege that the plaintiff is a citizen of another state, only that he owns and operates Dennis Trucking, a sole proprietorship with its principal place of business in Ohio, that his truck is registered in Ohio, and that he

is subject to taxation because his truck is registered in Ohio.

The case was tried on a stipulated record consisting of two exhibits: a stipulation of facts and the affidavit of the Lancaster County assessor. There was no proof that the plaintiff is a citizen of another state.

There was no error in dismissing the plaintiff's claim based on a violation of the privileges and immunities clause. The statutes do not discriminate on the basis of citizenship or residency, and there was no proof that the plaintiff was a citizen of another state and had standing to pursue a claim under the privileges and immunities clause.

By the cross-appeal the defendants contend that the trial court erred in finding that the plaintiff and his attorneys were entitled to payment of their expenses and reasonable fees under the equitable fund doctrine. This finding was in error for several reasons.

A statement of the common fund doctrine is found in *Summerville v. North Platte Valley Weather Control Dist.*, 171 Neb. 695, 696-97, 107 N.W.2d 425, 427 (1961):

> [W]here one has gone into a court of equity and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to the litigant's counsel.

The doctrine presupposes the existence of a fund. As the court in *Crane Towing v. Gorton*, 89 Wash. 2d 161, 176-77, 570 P.2d 428, 437 (1977), said: "As the name implies, the 'common fund' doctrine requires the prevailing party to have brought suit to preserve or protect a fund which benefits the party and others."

There is no fund in this case, much less a fund within the jurisdiction of the trial court.

> The common fund must be an immediate fund from which attorney's fees may be awarded at trial. *Seattle Sch. Dist. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). The effect of this litigation may well benefit other nursing homes in the state. However, it did not create a presently existing common fund at trial from which reasonable attorney's fees could be awarded.

United Nursing Homes v. McNutt, 35 Wash. App. 632, 643, 669 P.2d 476, 483 (1983).

In *Hoffman v. Lehnhausen*, 48 Ill. 2d 323, 329, 269 N.E.2d 465, 469 (1971), the Supreme Court of Illinois said:

> Several considerations set this case apart from the usual situation in which attorneys fees are allowed from a fund brought into court by one who sues as a member of a class. No fund was involved in this case. The attorneys for the plaintiffs say that this circumstance is irrelevant, because the trial judge refused to enter an order which would have created such a fund. Again we think, however, that the ruling of the trial court was correct. We are aware of no authority under which the process of tax collection and distribution could have been interrupted to divert from the governmental bodies that had levied the taxes an amount fixed by the court as fees for the attorneys for the plaintiffs.

In *Lebanks v. Spears*, 417 F. Supp. 169, 174 (E.D. La. 1976), the court said:

> *Mills* [*v. Electric-Auto Lite*, 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970),] and *Hall* [*v. Cole*, 412 U.S. 1, 93 S. Ct. 1943, 36 L. Ed. 2d 702 (1973)], and the discussion of the common fund theory in

> *Alyeska* [*Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)], require for an award of attorneys' fees under the common benefit rationale (1) an ascertainable class of beneficiaries, easily identifiable, and (2) a source of funds common to the class from which the award can be made. Public interest litigation generally cannot meet these requirements. Actions to vindicate constitutional rights which benefit the public usually can present only the "private attorney general" theory for the award of attorneys' fees. Prevailing parties in public interest litigation ought not to be permitted, by emphasizing the importance of enforcing constitutional rights, to attach the "common benefit" label to what is really the "private attorney general" theory, and ultimately to merge the two theories.

In *Hamer v. Kirk*, 64 Ill. 2d 434, 442, 356 N.E.2d 524, 528 (1976), the court said: "[I]n the absence of a fund, a plaintiff's attorney is not entitled to attorney's fees merely because he has conferred a benefit upon members of a class." The court held that because no fund had been created, nor did the court have the authority to create a fund, the substantial benefit theory did not apply to the facts presented. The court further held that no statutory authority existed on which to base an award of attorney fees under the private attorney general theory. The order of the trial court denying an award of attorney fees to the plaintiffs was affirmed.

In *Hamer v. Kirk, supra*, the Supreme Court of Illinois held attorney fees could not be awarded under the common fund doctrine where there was no fund within the control of the court. The Supreme Court reviewed its prior decisions in *Rosemont Bldg. Sup. v. Highway T. Auth.*, 51 Ill. 2d 126, 281 N.E.2d 338 (1972), and *The People v. Holten*, 304 Ill. 394, 136 N.E. 738 (1922), in which the court recognized that if a fund is to serve as

a source of attorney fees, said fund must be under the control of the court. In *Hamer, supra* at 441, 356 N.E.2d at 527, the court concluded that "[s]ince no fund had been placed under control of the court in the instant case, the trial court was without authority to award attorney's fees to the petitioner." See also, *Van Emmerik v. Montana Dakota Utilities Co.*, 332 N.W.2d 279 (S.D. 1983), *cert. denied* 464 U.S. 915, 104 S. Ct. 278, 78 L. Ed. 2d 257; *Eckford v. Borough of Atlanta*, 173 Ga. 650, 160 S.E. 773 (1931); *Fitzgerald v. City of Philadelphia*, 87 Pa. Commw. 482, 487 A.2d 485 (1985); *Von Holt v. Izumo Taisha Mission*, 44 Haw. 147, 355 P.2d 40 (1960), *aff'd on rehearing* 44 Haw. 365, 355 P.2d 44; *Satoskar v. Indiana Real Estate Commission*, 517 F.2d 696 (7th Cir. 1975), *cert. denied* 423 U.S. 928, 96 S. Ct. 276, 46 L. Ed. 2d 256 (1975); *Townsend v. Edelman*, 518 F.2d 116 (7th Cir. 1975).

In *Private Truck Council of America v. State*, 128 N.H. 466, 477, 517 A.2d 1150, 1157 (1986), a suit nearly identical to the case at bar, the Supreme Court of New Hampshire found that the plaintiffs had "not demonstrated a common law right to attorney's fees under the theory of a 'common fund' for the benefit of a class because, as we have indicated, this action has not been properly certified as a class action."

Each person who may be entitled to a refund must individually file a separate claim for a refund. Each such claim may be denied for a variety of reasons. The merits of each claim for a refund must be determined on a case-by-case basis. There is no evidence that anyone, including the plaintiff, has filed a claim and is entitled to a tax refund.

The plaintiff argues that the trial court should have found that the common fund consisted of the total amount of taxes subject to refund. Not only was there no evidence of what that amount might be, the trial court had

no jurisdiction of other persons who may have paid the invalid taxes or any way of knowing whether such amounts would be subject to a refund if claims were made.

There was no basis upon which an award of attorney fees could have been made against the State of Nebraska because the State has not waived its sovereign immunity as to attorney fees under circumstances such as this case. See, Neb. Const. art. V, § 22; *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962).

The judgment of the district court is affirmed, except as to that part which provides: "The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees." That part of the judgment is reversed.

AFFIRMED IN PART,
AND IN PART REVERSED.

FAHRNBRUCH, J., not participating.

APPENDIX B

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Docket 390 Page 26

MARK E. DENNIS, d/b/a Dennis Trucking,
Plaintiff,

vs.

STATE OF NEBRASKA, *et al.*,
Defendants.

ORDER

This matter came before the Court on June 3, 1987, for trial on the plaintiff's second amended petition. The plaintiff appeared by his attorneys, Richard A. Allen and Richard L. Spangler, Jr. The defendants appeared by their attorneys, Special Assistant Attorney General Ruth Anne Evans and Assistant Attorney General Jill Gradwohl Schroeder. Trial was held upon stipulation of facts received in evidence as Exhibit No. 1 and Exhibit No. 2, the affidavit of County Assessor Robert McGee, which set forth the various valuations used by the Lancaster County Assessor for the purpose of assessing ad valorem taxes on various models of 1979 truck-tractors. Exhibit No. 2 was received in evidence over the objections of the plaintiff. The matter was then argued and submitted to the Court on briefs. The Court being fully advised, now finds and orders as follows:

1. This is an action for a declaratory judgment to declare retaliatory taxes imposed by Nebraska Revised Statute §§ 60-305.02 and 60-305.03 unconstitutional, and

to enjoin the defendants from enforcing and collecting the tax.

2. The Court adopts as its findings of fact the stipulations of facts received in evidence as Exhibit No. 1 and the affidavit setting forth valuations of various models of 1979 truck-tractors received in evidence as Exhibit No. 2.

3. The plaintiff is entitled to judgment on Count I of his second amended petition declaring that the retaliatory taxes and fees imposed on plaintiff pursuant to §§ 60-305.02 and 60-305-03, Revised Statutes of Nebraska, are unconstitutional in that they constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution because they are imposed only on motor carriers whose vehicles are registered outside the State of Nebraska, while no comparable tax or fee is imposed on carriers whose vehicles are registered in the State of Nebraska. On their face said taxes and fees discriminate against interstate commerce.

4. The plaintiff has failed to sustain his burden of proving that he is entitled to judgment on Count II, denial of privileges and immunities, Count II, violation of Article III, Section 18 of the Constitution of the State of Nebraska, and Count IV, violation of 42 U.S.C. § 1983.

5. The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees. The Court shall determine the amount of any such expenses and fees by subsequent order following the submission of documentation regarding the fund from which said expenses and fees may be paid.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the retaliatory taxes and fees imposed on plaintiff pursuant to §§ 60-305.02 and 60-305.03, Revised Statutes of Nebraska, are unconstitutional in that they constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8,

Clause 3 of the United States Constitution. The defendants are permanently enjoined from assessing, levying or collecting taxes or fees pursuant to said statutes.

The plaintiff has failed to sustain his burden of proving that he is entitled to judgment on Counts II, III and IV of the second amended petition and said Counts II, III and IV should be and they are hereby dismissed. Costs of this action are taxed to the defendants in their official capacities.

The plaintiff and his attorneys are entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees. The Court shall determine the amount of any such expenses and fees by subsequent order following the submission of documentation in support thereof and a showing regarding any fund available for payment of said fees and expenses.

The Court now having found that the retaliatory taxes and fees imposed pursuant to §§ 60-305.02 and 60-305.03, Revised Statutes of Nebraska, are unconstitutional. The Court now pursuant to its order of June 17, 1985, finds that today's order shall be applicable to all persons affected thereby. Each person affected will be required to submit a claim to the Department of Administrative Services as provided in § 77-2406, Revised Statutes of Nebraska. In addition, each of the persons requesting a refund will be required to show proof of the date of payment, the amount paid, whether or not such payments were voluntary, and shall be required to provide such other information and proof as deemed necessary by the Department of Administrative Services.

DATED AND SIGNED this 30th day of September, 1987.

BY THE COURT:

/s/ Bernard J. McGinn
BERNARD J. MCGINN
District Judge

APPENDIX C

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Docket 390 Page 26

PRIVATE TRUCK COUNCIL OF AMERICAN, INC., and DENNIS TRUCKING, on behalf of themselves and others similarly situated, *Plaintiffs*,

v.

STATE OF NEBRASKA; HOLLY JENSEN, Director, Nebraska Department of Motor Vehicles; LOU LAMBERTY, Director, Nebraska Department of Roads; KAY ORR, Nebraska State Treasurer,

Defendants.

ORDER

The instant cause of action was commenced on December 17, 1984, by the filing of a Petition in the District Court of Douglas County, Nebraska. Plaintiffs also filed a Motion for Preliminary Injunction or in the Alternative to Require Placement of Tax Collections in Escrow together with the Affidavit of Janis Dennis on December 27, 1984.

The defendants, pursuant to Neb.Rev.Stat. § 24-324 (Reissue 1979), filed a Motion for Change of Venue together with a Motion for Continuance of the hearing on plaintiff's Motion for Preliminary Injunction. Each individual defendant also filed separate Demurrers to the Petition of the plaintiffs. All of the foregoing Motions were set for hearing on January 21, 1985, before the Honorable John E. Clark, District Court Judge.

On January 21, 1985, the plaintiffs appeared by and through their counsel, John F. Thomas and Jacob P. Billig. Defendants appeared by and through their counsel, Ruth Anne E. Galter and Jill Gradwohl, Assistant Attorneys General for the State of Nebraska. Arguments were heard on defendants' Motion for Change of Venue and Motion for Continuance of the hearing for Preliminary Injunction. Defendants' motions were sustained, per J. Clark, and the cause of action was properly transferred to the District Court of Lancaster County, Nebraska, on January 22, 1985. The record reflects that the same was entered at Docket 390, Page 26 of the Lancaster County District Court on January 25, 1985.

In this court, plaintiffs then filed a Motion to Certify the Class and a Motion for Summary Judgment. The defendants filed a Motion to Strike the plaintiffs' Motion for Summary Judgment. A hearing was held on March 18, 1985, before the Honorable Dale E. Fahrnbruch, District Court Judge. Plaintiffs appeared by and through their counsel, Richard L. Spangler, Jr. Defendants appeared by and through their counsel Ruth Anne E. Galter. The Motion to Strike was argued, submitted, and sustained for the reason that no issues had been framed since defendants had not yet answered plaintiff's Petition. Therefore, the filing of a Motion for Summary Judgment by plaintiffs was premature.

Thereafter, on March 22, 1985, with all counsel present, a hearing was held on plaintiffs' Motion for Preliminary Injunction or in the Alternative to Require Placement of Tax Collections in Escrow, on plaintiffs' Motion to Certify the Class, and on the Demurrers of defendants, and each of them. Evidence was adduced, all matters were argued, and the parties submitted briefs in support of their respective positions.

The Court, now being fully advised in the premises, finds from the pleadings that, although the plaintiffs refer in paragraph 10 of their Petition to a "fuel tax on the

consumption of motor fuel within the State," the cause of action is, in fact, related only to what plaintiffs have alleged to be "retaliatory taxes" imposed pursuant to Neb.Rev.Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984).

The Court finds from the pleadings, files, and arguments of counsel, that plaintiff Private Truck Council of America, Inc. has no legal standing in this lawsuit and therefore no standing to be a party plaintiff and is not the real party in interest. The Court further finds that Dennis Trucking, according to the pleadings, is an unincorporated motor carrier and as such is not a legal entity. Therefore Dennis Trucking has no legal capacity to bring this action. It is apparent from the briefs of plaintiffs and the Affidavit filed in support of the Motion for Preliminary Injunction that Dennis Trucking is operated by one or more individuals, doing business as Dennis Trucking. However, the Court finds that designating a plaintiff as Dennis Trucking does not place before this Court the individuals owning and/or operating that business. Therefore, in the event of taxing of costs, the Court cannot assess costs against Dennis Trucking.

The Court finds that pursuant to Article VIII, Section 9, of the Constitution of the State of Nebraska that "[t]he Legislature shall provide by law that all claims upon the treasury shall be examined and adjusted as the Legislature may provide before any warrant for the amount allowed shall be drawn." The Court finds that the Legislature has provided that "all claims of whatever nature upon the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined, adjusted and approved by the Department of Administrative Services. No warrants shall be drawn for any claim until an appropriation shall have been made therefore." Neb.Rev.Stat. § 77-2406 (Reissue 1981).

The Legislature has further provided the method by which plaintiffs may attack the validity of the imposition of a tax:

> If a person who claims a tax or any part thereof to be invalid for any reason other than the valuation of the property shall have paid the same to the treasurer or other proper authority in all respects as though the same was legal and valid, he or she may, at any time within thirty days after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within ninety days thereafter, he or she may sue such county treasurer for the amount so demanded. Upon the trial, if it shall be determined that such tax or any part thereof was for any reason invalid, judgment shall be rendered therefor with interest and such judgment shall be collected as in other cases. . . .

Neb.Rev.Stat. § 77-1735 (Supp. 1984).

The Court finds that it cannot, in a proceeding such as this, order a refund of taxes, nor does this Court have the authority to order the same to be placed in escrow at interest. Therefore, the plaintiffs' Motion for Preliminary Injunction or in the Alternative to Require Placement of Tax Collections in Escrow should be denied. The Court is not finding that it cannot enjoin the collection of taxes should the Court find the operational law unconstitutional.

The Court finds that the Motion to Certify the Class should also be denied for the reason that the instant cause of action is not a proper class action. If the Court determines the law to be unconstitutional, that determination will be applicable to all persons affected thereby. In the event of such a determination, each person affected will be required to submit a claim to the Department of Administrative Services as provided in Neb.Rev.Stat. § 77-2406. In addition, each of the persons requesting a refund would be required to show proof of the date of payment, the amount paid, whether or not such payments were made voluntarily, and would be required to provide such

other information and proof as deemed necessary by the Department of Administrative Services. The resolution of such claims must be determined on a case by case basis depending upon the individual proof submitted in support of each claim. Consequently, class resolution of such claims is inappropriate and improper.

The Court finds that the Demurrers of the Defendants, and each of them, should be sustained for the reason that there are no proper plaintiffs before this Court with standing or legal capacity to bring the instant cause of action.

IT IS THEREFORE ORDERED THAT plaintiffs' Motion for Preliminary Injunction or in the Alternative to Require Placement of Tax Collections in Escrow and plaintiffs' Motion to Certify the Class should be and the same hereby are, overruled and denied; that the Demurrers of the Defendants, and each of them, should be, and the same hereby are, sustained; that plaintiffs shall have 30 days from the date of this order to file an amended petition; and that if an amended petition is not filed within 30 days, the case shall stand dismissed with all costs taxed to Private Truck Council of America, Inc.

IT IS SO ORDERED.

Dated this 17th day of June, 1985.

BY THE COURT:

/s/ Dale E. Fahrnbruch
District Court Judge

APPENDIX D

Neb. Rev. Stat. § 60-305-02 (Reissue 1984) provided:

> 60-305.02. Nonresident owners; trucks and buses; registration; reciprocity. Trucks, truck-tractors, semitrailers, or buses, from states other than Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks, truck-tractors, semitrailers, trailers, or buses, and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks, truck-tractors, semitrailers, trailers, or buses, owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, in which such trucks, truck-tractors, semitrailers, trailers, or buses are domiciled, grant reciprocity comparable to that extended by the laws of Nebraska.

Neb. Rev. Stat. § 60-305.03 provided in pertinent part:

> 60-305.03. Nonresident owners; trucks and buses; where no reciprocity; fees; all vehicles, reciprocal agreements authorized; terms and conditions; revision; absence of agreement; effect. (1) In case a foreign state or territory is not reciprocal as to license fees on commercial trucks, truck-tractors, semitrailers, trailers, or buses, the owners of such nonresident vehicles from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks, truck-tractors, semitrailers, trailers, or buses, other than license fees, and the reciprocity law of any other foreign state or territory does not act to exempt Nebraska trucks, truck-tractors, semitrailers, trailers or buses operating in that state

> from payment of all fees whatsoever, the owners of such foreign trucks, truck-tractors, semitrailers, or buses shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks, truck-tractors, semitrailers, trailers, or buses: *Provided*, that the owners of all foreign trucks, truck-tractors, semitrailers, trailers, or buses, doing intrastate hauling in this state, shall be required to pay the same registration fees as those required to be paid by residents of this state, unless such vehicles are registered as a part of a fleet in interstate commerce, as provided in section 60-305.09. In no case shall the fee charged to an owner of a foreign motor vehicle exceed the total fees required to be paid on like vehicles by residents of the state. The Department of Roads shall act as an agent for the Department of Motor Vehicles in collecting such fees and shall remit all such fees collected to the State Treasurer, who shall place such money in the Highway Cash Fund.

No. 89-1555

In The

Supreme Court of the United States

October Term, 1989

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Whether claims for violation of the dormant Commerce Clause are cognizable under 42 U.S.C. §1983, so as to permit an award of attorneys' fees under 42 U.S.C. §1988.

LIST OF PARTIES

Respondents accept Petitioner's designation of parties in the Petition, with the exception of noting that the State of Nebraska was a named party defendant in the proceedings in the trial court, and was an Appellee and Cross-Appellant in the appeal decided by the Supreme Court of Nebraska. (Petition, 1a; 28a; 31a).

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OPINIONS BELOW

The opinion of the Supreme Court of Nebraska [hereinafter "State Court"], reprinted in Appendix A to the Petition, is reported as *Dennis v. State*, 234 Neb. 427, 451 N.W.2d 676 (1990). The opinion of the District Court of Lancaster County, Nebraska, reprinted in Appendix B to the Petition, is not reported.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents are satisfied with the constitutional provisions and statutes set forth in the Petition.

STATEMENT OF THE CASE

Respondents submit that an adequate and concise statement of the case, including all facts material to the question presented, is provided in the opinion of the State Court. (Petition, 3a-4a).

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Respondents respectfully submit that the Petition should be denied.

I. THE APPLICATION OF 42 U.S.C. § 1983 TO CLAIMS UNDER THE COMMERCE CLAUSE IS NOT A QUESTION AS TO WHICH A GENUINE CONFLICT AMONG THE CIRCUITS EXISTS.

The Petitioner requests the Court to review the State Court's decision that there is no cause of action under 42 U.S.C. § 1983 (1982) for violations of the Commerce Clause. In support of his request, Petitioner asserts there is a conflict among the Circuits and several state supreme courts on the question of whether a claim for violation of the Commerce Clause is cognizable under 42 U.S.C. § 1983. Petition, pp. 8-9. Respondents submit a review of the cases cited by Petitioner reveals the conflict on this issue is not substantial and is not of the type to make this case deserving of further review.

In order to warrant a writ, there must be a "real or 'intolerable' conflict on the same matter of law or fact, and not merely inconsistency in dicta. . . ." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.3 (6th ed. 1986). The conflict relied upon by Petitioner, however, arises principally from a remark made in a footnote to the Third Circuit's opinion in *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980), stating that claims under the Commerce Clause and the Williams Act are actionable under § 1983. There was no considered discussion of the

issue, and, in any event, the remark was dictum, as the injunction sought was sustainable on grounds other than the § 1983 exception to the Anti-Injunction Act, 28 U.S.C. § 2283.

The Sixth Circuit decision in *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982), is similarly devoid of any discussion as to the propriety of a party maintaining a cause of action under § 1983 for violation of the Commerce Clause. The sole reference to the issue is a conclusory remark that the plaintiffs stated claims under § 1983 based on alleged violations of the Supremacy Clause and the Commerce Clause. *Id.* at 562. There is no indication in the Sixth Circuit's opinion that the propriety of this conclusion was either challenged or considered. The federal district court decision from the Sixth Circuit cited by Petitioner, *ANR Pipeline Co. v. Michigan Public Service Commission*, 608 F.Supp. 43, 48 (W.D.Mich. 1984), simply follows the erroneous statement in *Martin-Marietta Corp. v. Bendix Corp.* in finding that § 1983 covers actions brought under the Supremacy Clause and the Commerce Clause.

The Eleventh Circuit decision in *Continental Illinois Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), *vacated as moot*, ___ U.S. ___, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990), is cited by Petitioner as support for the proposition that a Commerce Clause challenge may properly be brought under § 1983, thus permitting an award of attorneys fees under § 1988. This Court vacated and remanded the Circuit Court's decision upon finding the basis for the action had been rendered moot by amendments to the Bank Holding Company Act enacted shortly before the Court of Appeals issued its initial opinion. ___ U.S. at ___,

110 S.Ct. at 1252-53, 108 L.Ed.2d at 408. As a result of the underlying controversy being rendered moot, the Court did not address whether Continental could have been a "prevailing party" in the district court, as required to recover fees under § 1988, and declined to resolve "the related question whether § 1988 fees are available in a Commerce Clause challenge." ___ U.S. at ___, 110 S.Ct. at 1256, 108 L.Ed.2d at 414.

An examination of the Eleventh Circuit's decision, however, reveals no explanation as to what basis the court relied upon to award attorneys fees on appeal, and the Circuit Court's opinion contains no discussion whatsoever on the issue of whether § 1983 is applicable to claims for violation of the Commerce Clause. 838 F.2d at 458.[1] Under these circumstances, it is at best debatable as to whether the decision in *Continental Illinois Corp. v. Lewis* presents a clear and definitive statement of the Eleventh Circuit's position on the question presented by Petitioner. Furthermore, as the *Continental Illinois* case presented questions for review other than the § 1983 issue, it is not clear the Court would have granted the writ in that case if the only question presented had been the applicability of § 1983 to Commerce Clause claims.[2]

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[1] Indeed, it appears Continental suggested the Court of Appeals awarded attorneys fees as a sanction against Lewis under 28 U.S.C. § 1927. Brief for Appellant at 37 n.95, *Lewis v. Continental Bank Corp.*, Dkt. No. 87 – 1955.

[2] In the other case cited by Petitioner, *Confederated Salish and Kootenai Tribes v. Moe*, 392 F.Supp. 1297 (D.Mont. 1975), *aff'd on other grounds*, 425 U.S. 463 (1976), an Indian tribe and

(Continued on following page)

In contrast to the foregoing, the decision principally relied upon by the State Court, *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1146-47 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984), exhaustively treated the question presented in light of this Court's determination in *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 612-15 (1979), that claims under the Supremacy Clause do not rise to the level of a claim of "right" "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3), the jurisdictional counterpart to § 1983, and the Court's subsequent decisions in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981) and *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1, 19 (1981), holding that § 1983 creates a remedy only where the statutory provision on which a claim is

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(Continued from previous page)

some of its members challenged a Montana tax partly on Commerce Clause grounds. A three-judge district court found jurisdiction over the tribal claims under 28 U.S.C. § 1362, and, without further analysis, found jurisdiction over the individual claims under 28 U.S.C. § 1343(3) because the "alleged violation of Commerce Clause rights" stated a claim under § 1983. 392 F.Supp. at 1305. This Court affirmed the jurisdictional holdings with regard to the tribal claims under § 1362, but found it unnecessary to determine the correctness of the holding that § 1343(3) provided jurisdiction over the individual claims. In a footnote, however, this Court reminded the lower court that in further proceedings the claims of the individual plaintiffs "must be properly grounded jurisdictionally." 425 U.S. at 468-69 n.7 (citation omitted). It should be noted the lower court's decision predates this Court's decisions in *Chapman v. Houston Welfare Rights Org., infra; Pennhurst State School and Hospital v. Halderman, infra; Middlesex County Sewerage Authority v. National Sea Clammers Ass'n., infra;* and *Golden State Transit Corp. v. City of Los Angeles, infra.*

founded "secures" a "right".[3] Interpreting § 1983 in light of these decisions and the developing jurisprudence under the Commerce Clause, the Eighth Circuit held the Commerce Clause "deals with the relationship between state and national interests, not the protection of individual rights," and thus did not confer a right actionable under § 1983. *Consolidated Freightways*, 730 F.2d at 1144-47.[4]

Since this Court's denial of certiorari in *Consolidated Freightways*, every court which has squarely analyzed and discussed the question presented by Petitioner has held the Commerce Clause does not create "rights, privileges, or immunities secured by the Constitution" enforceable under § 1983. *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985); *Pesticide Public Policy Foundation v. Village of Wauconda*, 622 F.Supp. 423 (N.D. Ill. 1985), *aff'd* 826 F.2d 1068 (7th Cir. 1987); *State of Ga. v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. State*, 221 N.J.Super. 89, 534 A.2d 13 (1987), *aff'd* 111 N.J. 214, 544 A.2d 33 (1988);

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[3] Recently, the Court definitively held that the Supremacy Clause does not, of its own force, create rights enforceable under § 1983. *Golden State Transit Corp. v. City of Los Angeles*, __ U.S. __, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989).

[4] As noted above, this Court denied a petition for certiorari in the *Consolidated Freightways* case. 469 U.S. 834 (1984). The petition for certiorari in that case raised the same issue as the instant petition. Petition for Writ of Certiorari, Dkt. No. 83 - 2119. Nothing has occurred since the Court's denial of certiorari in *Consolidated Freightways* which would compel a different result in this case.

Private Truck Council of America, Inc. v. Secretary of State, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America, Inc. v. State*, 128 N.H. 466, 517 A.2d 1150 (1986). Given the lack of any genuine and clear conflict among either the Circuits or state supreme courts subsequent to the Court's refusal to grant review of this issue in *Consolidated Freightways*, Respondents submit the Court should decline to grant the writ sought by Petitioner.

II. THE STATE COURT'S DECISION IS NOT CONTRARY TO DECISIONS OF THIS COURT INVOLVING THE COMMERCE CLAUSE.

Petitioner also claims the State Court's determination that the Commerce Clause does not secure individual "rights" cognizable under § 1983 is contrary to various decisions of this Court which refer to a "right" to engage in interstate commerce. Petition, pp. 10-11. The following discussion from the Eighth Circuit's decision in *Consolidated Freightways Corp. v. Kassel* effectively refutes Petitioner's assertions:

> It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and state interests, not the protection of individual rights. These decisions are replete with references to the *national* or *federal interest* in preventing the burdensome state regulation of interstate commerce. *See, e.g., Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524, 79 S.Ct. 962, 965, 3 L.Ed.2d 1003 (1959); *Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-42, 69 S.Ct. 657, 664-67, 93 L.Ed. 865 (1949); *Southern Pacific Co. v. Arizona*, 325 U.S. 761,

775-76, 65 S.Ct. 1515, 1523-24, 89 L.Ed. 1915 (1945).

* * *

To support its theory that the Commerce Clause secures rights cognizable under § 1983, Consolidated has cited several Supreme Court cases which refer to a Constitutional "right" to engage in interstate commerce. *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967); *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 21, 30 S.Ct. 190, 195, 54 L.Ed. 355 (1910); *Crutcher v. Kentucky*, 141 U.S. 47, 57, 11 S.Ct. 851, 853, 35 L.Ed. 649 (1891). Although these cases do refer to engaging in interstate commerce as a constitutional right, such cases were not dealing with the question of whether the Commerce Clause secures individual rights within the meaning of § 1983. In *Garrity* the reference to interstate commerce was mere dictum, and in both *Western Union* and *Crutcher*, the focus of the Court's opinions was on the separation of powers between the national and state legislatures. Despite these references to a right to engage in interstate commerce, we agree with the district court that the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy. *See generally Hood & Sons, Inc.*, 336 U.S. at 537-39, 69 S.Ct. at 664-66.

Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of § 1983.

730 F.2d at 1144-45 (footnotes omitted).

Indeed, the plain meaning of the statutory language employed in § 1983 precludes the conclusion that a claim of violation of the Commerce Clause is actionable under § 1983. A claim that state action violates the dormant Commerce Clause does not state a claim for "the deprivation of any rights, privileges, or immunities secured by the Constitution . . . to any citizen or other person" as required by § 1983. The language of the Commerce Clause makes no reference to any right, privilege, or immunity secured to citizens or persons. Rather, the Commerce Clause deals specifically with a *power* granted to Congress, stating: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ." U.S.Const., Art. I, sec. 8, cl. 3.[5]

Thus, the Commerce Clause vests the national government with the plenary "power" to regulate interstate commerce. The Court has not enforced the Commerce Clause as an individual constitutional right granted to individual market participants, but rather as a means to allocate power between the state and federal governments to protect and preserve the national economy. *See, e.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949) (purpose of Commerce Clause is to promote competition and the free flow of commerce so as to prevent "economic isolation" and ensure that "our economic unit is the Nation."). While individuals possess the ability to

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[5] A leading authority has identified four separate classes of legal entitlements: "rights," "privileges," "immunities," and "powers." Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 Yale L.J. 16 (1913). Significantly, § 1983 contains reference only to the first three of these entitlements.

bring suit to enforce the supreme power of the federal government over matters relating to interstate commerce, the ability of an individual to sue as an incidental or indirect beneficiary of the federal "power" over interstate commerce is not a constitutional "right" protected by § 1983.

This is consistent with the decision of the State Court, adopting the Eighth Circuit's view in *Consolidated Freightways Corp. v. Kassel*, that "the Commerce Clause was adopted, and the dormant Commerce Clause doctrine evolved, not to protect individual rights, but to further the national interest in an efficient economy." 730 F.2d at 1145. Furthermore, as explained by one commentator, the fact that the Court has, on occasion, made general references to a "right" to engage in interstate commerce, does not establish the existence of a constitutional "right" within the meaning of § 1983:

> [T]he Court sometimes has referred to a 'right' to engage in interstate commerce free of state impediments. In addition, modern dormant commerce clause analysis focuses primarily on the antiprotectionist and nondiscrimination principles that the clause embraces. But judicial enforcement of such constitutional limits on state government at the behest of private parties no more secures an individual right for the purposes of § 1983 than it does in the context of the supremacy clause, or other provisions that allocate power between the states and federal government. And although it is true that federalism limitations protect individual freedoms, the right here is not one to be free of discriminatory legislation, but to be free of it in the absence of a congressional mandate.

Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo.L.J. 1493, 1550 (1989) (footnotes omitted).

In sum, when taken in proper context, the asserted inconsistency between the decision of the State Court and statements contained in decisions of this Court as to the scope of the Commerce Clause does not, in reality, exist. Accordingly, the Court should decline to grant the writ.

III. THE APPLICATION OF § 1983 TO COMMERCE CLAUSE CLAIMS DOES NOT PRESENT AN IMPORTANT QUESTION NECESSITATING REVIEW.

Finally, Petitioner asserts the application of § 1983 to claims under the Commerce Clause is "extremely important to the effective enforcement" of the Clause. Petition, p. 12. An analysis of the nature and long history of Commerce Clause litigation, however, reveals this assertion is unwarranted. Furthermore, Respondents submit the expansion of § 1983 into the realm of Commerce Clause litigation is not only unnecessary to ensure the effective enforcement of the Clause, but would also be extremely detrimental to state interests.

Commerce Clause claims, unlike claims brought to redress violations of individual constitutional rights, are economic in nature and involve disputes between business interests and government over taxes and other regulatory legislation. From a historical perspective, it was not until four years after § 1983 was enacted that private parties began to litigate Commerce Clause cases in federal court. Act of March 3, 1875, § 1, 18 Stat. 470 (creating

federal question jurisdiction) (codified as amended at 28 U.S.C. § 1331). Previously, dormant Commerce Clause claims were brought in state court. Following enactment of the federal question statute in 1875, actions involving dormant Commerce Clause claims brought in federal court were based on federal question jurisdiction, not § 1983 and its jurisdictional counterpart. Collins, *supra*, 77 Geo.L.J. at 1507-33; 1551. Even after the creation of federal question jurisdiction, numerous Commerce Clause cases have been brought in state court, including the instant case, subject to the possibility of review in this Court. *E.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. at 529.

Thus, private litigants have historically possessed sufficient opportunities and incentives to litigate Commerce Clause claims without resort to § 1983. The only reason to bring such a claim under the civil rights legislation is to enhance the opportunity to recover damage awards and to secure attorneys' fees under § 1988. There is no reason to believe Congress intended to embrace claims under the Commerce Clause within the coverage of § 1983. Long before the progenitor of § 1983 was enacted in 1871, private litigants had resort to the courts to assert claims that state actions violated the Commerce Clause. *See, e.g., Passenger Cases* (*Norris v. City of Boston*), 48 U.S. 122, 139, 7 How. 283, ___ (1848); *cf. Brown v. Maryland*, 25 U.S. 262, 12 Wheat. 419 (1827). There was no need for Congress to create an additional remedy for such claims in the 1871 Civil Rights Act. It is also unlikely that Congress, in enacting 42 U.S.C. § 1988, "[t]he purpose of

[which] is to ensure 'effective access to the judicial process,' " *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), intended to reverse the traditional American rule against fee shifting for cases which historically had "effective access" to the courts.

Furthermore, as a matter of policy, attorneys' fees awards are neither necessary nor desirable in dormant Commerce Clause litigation. Business interests challenging discriminatory state regulation (unlike individuals seeking redress for violations of personal rights guaranteed by the Constitution) do not need the economic incentive of attorneys' fees to prosecute Commerce Clause claims. The imposition of damage awards and attorneys' fees in Commerce Clause litigation would impose a serious financial burden on state officials and would undoubtedly have a chilling effect on their willingness to engage in legitimate and needed activities in areas such as taxation and the regulation of business activity. Collins, *supra*, 77 Geo. L.J. at 1562. The purpose of § 1983, to provide a means to redress violations of individual civil liberties guaranteed by the Constitution, is not promoted by allowing resort to its provisions as a means to further purely economic interests. The extension of § 1983 into the realm of Commerce Clause litigation is unwarranted both as a matter of law and as a matter of policy.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

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PETITIONER'S REPLY BRIEF

Respondents' various arguments in opposition to the petition for a writ of certiorari are insubstantial.

1. Respondents contend that the conflict among the circuits and state supreme courts on the question presented is not genuine but is "mere inconsistency in dicta." (Br. in Opp. at 2, quoting R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.3 (6th ed. 1986)). Respondents base this claim mainly on the fact that two of the decisions cited by petitioner—*Kennecott Corp. v. Smith*, 637 F.2d 181 (3rd Cir. 1980), and *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982)—found grounds in ad-

dition to violations of the Commerce Clause for concluding that the plaintiffs had stated a cause of action under § 1983 (*id.* at 2-3).

Respondents are incorrect. The fact that the decisions of the Third and Sixth Circuits rested on grounds in addition to the Commerce Clause violations does not make the rulings with respect to the Commerce Clause *dicta*. On the contrary, it is well settled that "where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court, and of equal validity with the other." *Union Pacific R.R. v. Mason City & F.D.R.R.*, 199 U.S. 160, 166 (1905). *See also, e.g., Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Lipson v. Snyder*, 701 F. Supp. 541, 544 (E.D. Pa. 1988). As such, the rulings of the courts on the Commerce Clause issue were holdings that established the law in those circuits and are binding on all courts in those circuits. *See ANR Pipeline Co. v. Michigan Public Service Commission*, 608 F. Supp. 43, 48 (W.D. Mich. 1984) (applying the holding in *Martin-Marietta Corp.*). Those holdings are and will continue to be directly in conflict with the law established in the Seventh, Eighth, Ninth and Tenth Circuits and in a number of states, and that conflict warrants this Court's review.

Nor is there any merit to respondents' suggestion (Br. in Opp. at 4) that the Eleventh Circuit's award of attorneys' fees in *Continental Illinois Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), *vacated as moot*, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990), may not have been based on 42 U.S.C. § 1988 or on the

court of appeals' considered conclusion that 42 U.S.C. § 1983 provides a remedy for Commerce Clause violations. The Commerce Clause/Section 1983 issue and the conflicting authorities on that issue were fully briefed to the Eleventh Circuit, and as the Solicitor General pointed out in urging this Court to give plenary review to the § 1983 issue in that case, the other grounds suggested by the plaintiff as a basis for an attorney fee award were manifestly unsupportable or were clearly secondary to the Commerce Clause ground.[1]

Furthermore, this is an issue that has arisen in many cases and, given the conflict among the circuits and the state courts, is one that will continue to recur until it is resolved by this Court.

2. Respondents dispute petitioner's claim that the ruling below—that the Commerce Clause does not secure personal constitutional rights—conflicts with decisions of this Court (Br. in Opp. at 7-11). Respondents, however, completely ignore the principal cases cited by petitioner, such as *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977), which held that certain stock exchanges had standing to "assert their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business . . .," and *Morgan v. Virginia*, 328 U.S. 373 (1946), which upheld the right of an interstate bus passenger under the Commerce Clause to travel on unsegregated buses, and *United States v. Guest*, 383 U.S. 745, 757-760 (1966), recognizing that individuals have a "constitutional right to travel from one State to another"

[1] Brief for the United States As Amicus Curiae at 20-21, *Lewis v. Continental Bank Corp.*, Supreme Court No. 87-1955.

based on the Commerce Clause. These rulings were not *dicta*, but were central holdings of the decisions. Presumably recognizing that the decision below cannot be reconciled with these decisions, respondents have simply ignored them.

3. Respondents also argue that the question presented is not important because the Commerce Clause claims are "economic in nature and involve disputes between business interests and government" (Br. in Opp. at 11) and because Commerce Clause claims can be asserted judicially without 42 U.S.C. § 1983 (*id.* at 12). These arguments are meritless. First, nothing in § 1983 or its legislative history suggests that it only redresses "noneconomic" injuries, and numerous cases prove the contrary. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1 (1980) (holding that § 1983 applies to a state's erroneous withholding of Social Security benefits). Moreover, it is doubtful that injuries from constitutional violations can be readily classified as either "economic" or "noneconomic" on any principled or workable basis.

Second, the fact that Commerce Clause claims have been and can be asserted in court without § 1983 is plainly irrelevant to the issue of whether Commerce Clause violations establish a cause of action under § 1983. Violations of many other constitutional and federal statutory provisions by states or under color of state law have also been asserted in court independently of § 1983, but that does not mean that § 1983 does not also provide a remedy for them or that attorneys' fees are not available under § 1988. Indeed, this Court has held that attorneys' fees are available under § 1988 even if the court granted relief for the violation on grounds other than § 1983 if relief

could have been granted under § 1983. *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980).

4. Finally, there is no basis whatever for respondents' claim that recognizing remedies under §§ 1983 and 1988 for Commerce Clause violations "would be extremely detrimental to state interests" and "would impose a serious financial burden on state officials and would undoubtedly have a chilling effect on their willingness to engage in legitimate and needed activities in areas such as taxation and the regulation of business activity." (Br. in Opp. at 11, 13). Recognizing a cause of action under § 1983 for Commerce Clause violations would not expose states or state treasuries to liability for damages, because this Court held in *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), that neither states nor state officials sued in their official capacities for money damages are "persons" that are subject to suit under § 1983. Nor would state officials who enforce state laws in good faith be exposed to personal liability for damages, and petitioner has not claimed such damages against respondents in this case. The only effects of recognizing a cause of action under § 1983 would be to require states who violated the Commerce Clause to pay the reasonable attorneys' fees and litigation expenses of prevailing litigants and to expose state officials who violate the Commerce Clause willfully and in bad faith to personal liability for the resulting harm.

These consequences do not threaten any serious financial harm to states or impose an unwarranted burden on state officials. On the contrary, in many cases they may serve as the only meaningful deterrent and sanction against the natural proclivity of states to

enact taxes and laws that disproportionately impact interstate commerce or out-of-state interests. *See Nippert v. Richmond*, 327 U.S. 416, 434-435 (1946). In this case, for example, Nebraska collected millions of dollars in taxes pursuant to the challenged tax before it was struck down. Because its courts refused to escrow the tax collections or permit a class action for refunds, the State will probably retain most of that money. If petitioner's claims for attorneys' fees and costs under § 1988 are also denied, the consequences to the State of its unconstitutional action will have been all profit and no cost.

CONCLUSION

The petition for a writ of certiorari should be granted.

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May 18, 1990

No. 89-1555

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARK E. DENNIS, PETITIONER

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1555

MARK E. DENNIS, PETITIONER

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA and its members frequently invoke 42 U.S.C. § 1983 in litigation challenging state action that deprives them of their right under the Commerce Clause to engage in interstate commerce free of unreasonable burdens and unlawful discrimination. See, *e.g.*, *American Trucking Associations, Inc.*

v. *Scheiner*, 483 U.S. 266 (1987); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *A.B.F. Freight System, Inc.* v. *Suthard*, 681 F. Supp. 334 (E.D. Va. 1988); *Commonwealth of Kentucky Transp. Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988). They accordingly have a substantial interest in ensuring that the remedy set forth in 42 U.S.C. § 1983, and the concomitant entitlement to attorneys' fees under 42 U.S.C. § 1988, extend to violations of that constitutional right. ATA filed an amicus curiae brief in *Lewis* v. *Continental Bank Corp.*, 110 S. Ct. 1249 (1990), addressing the question whether Commerce Clause claims are cognizable under Section 1983.[1]

ARGUMENT

THIS COURT SHOULD DECIDE WHETHER COMMERCE CLAUSE CLAIMS ARE COGNIZABLE UNDER SECTION 1983

In *Lewis* v. *Continental Bank Corp.*, 110 S. Ct. 1249 (1990), this Court granted review to consider, among other questions, whether the plaintiff was entitled to an attorneys' fee award under 42 U.S.C. § 1988 on the ground that it had prevailed on its claim under 42 U.S.C. § 1983 by proving a violation of the Commerce Clause. Because the Court vacated the court of appeals' judgment in that case on other grounds, it "decline[d] to resolve * * * the * * * question whether § 1988 fees are available in a Commerce Clause challenge." 110 S. Ct. at 1256. The present case provides the Court with another opportunity to resolve that important and unsettled legal question. The Court already has had the benefit of

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 36.

full briefing and argument concerning the issue. Moreover, in contrast to *Lewis*, the issue is squarely and cleanly presented in this case. The petition for a writ of certiorari should therefore be granted. See also *Private Truck Council, Inc.* v. *Quinn*, 476 U.S. 1129 (1986) (Justice White, joined by Justices Brennan and O'Connor, dissenting from denial of certiorari) (recognizing that the Court should decide this issue).

A. The Lower Courts Disagree As To Whether Section 1983 Extends To Claims Under The Commerce Clause, And The Issue Is One Of Substantial Practical Importance.

There is a square conflict among the lower courts concerning the question presented in this case. A number of courts have held, like the court below, that Commerce Clause claims do not fall within the ambit of Section 1983. See *Kraft* v. *Jacka*, 872 F.2d 862 (9th Cir. 1989); *J&J Anderson, Inc.* v. *Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985); *Consolidated Freightways Corp.* v. *Kassel*, 730 F.2d 1139, 1144-1145 (8th Cir.), cert. denied, 469 U.S. 834 (1984); see also Pet. 8 n.10 (citing cases).

Three courts of appeals have reached the opposite conclusion, holding that Commerce Clause claims may be asserted under Section 1983. *Martin-Marietta Corp.* v. *Bendix Corp.*, 690 F.2d 558, 562 (6th Cir. 1982); *Kennecott Corp.* v. *Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980); *Continental Illinois Corp.* v. *Lewis*, 838 F.2d 457 (11th Cir. 1988), vacated on other grounds, 110 S. Ct. 1249 (1990). See also *Private Truck Council, Inc.*, 476 U.S. at 1129 (Justice White, joined by Justices Brennan and O'Connor, dissenting from denial of certiorari) (acknowledging

conflicting lower court decisions with respect to the question presented in this case).

Moreover, the question is one of substantial practical importance. As the United States observed in its amicus brief at the jurisdictional stage in *Lewis*, "the volume of Commerce Clause litigation makes the question of Section 1983's coverage, and hence of Section 1988's coverage, an important one." 87-1955 U.S. Am. Br. at 19. Commerce Clause claims come before this Court with considerable frequency, and, of course, many more such actions are prosecuted in the lower courts each year.

As the petition demonstrates (at 12-15), Congress provided for awards of attorneys' fees in Section 1983 actions because it concluded that the spiraling cost of litigation would otherwise deter plaintiffs from protecting rights secured by the Constitution. If, as the Nebraska Supreme Court held, attorneys' fee awards are not available in cases in which a plaintiff successfully challenges state action under the Commerce Clause, the result is likely to be precisely what Congress sought to prevent: plaintiffs with meritorious Commerce Clause claims will decline to press those claims in court because they cannot afford to shoulder the cost of the litigation. Decisions like the one below thus erect a substantial obstacle to the full vindication of this fundamental federal right.

B. The Court Below Erred In Holding That Commerce Clause Claims May Not Be Brought Under Section 1983.

Review is warranted in this case for the additional reason that the narrow construction of Section 1983 adopted by the court below is plainly wrong.

The proper starting point is, of course, the language of the statute. Section 1983 provides a remedy when a person acting under color of state law deprives the plaintiff of "*any* rights, privileges, or immunities secured by the Constitution and laws" (emphasis added). Congress's choice of words establishes that this remedial statute has the widest possible compass. "It is difficult to imagine broader language." *United States* v. *James*, 478 U.S. 597, 604 (1986).

Indeed, this Court already has concluded that this phrase "must be given the meaning and sweep that * * * [its] language dictate[s]"; the remedy extends to rights secured by " '*all* of the Constitution and laws of the United States.' " *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 & n.16 (1972) (emphasis in original) (quoting *United States* v. *Price*, 383 U.S. 787, 797 (1966)). See also *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989) ("We have repeatedly held that the coverage of [Section 1983] must be broadly construed."); *Monell* v. *Dep't of Social Services*, 436 U.S. 658, 700-701 (1978) ("there can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights"); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 663 (1979) (White, J., concurring) (Section 1983 "protect[s] against state invasions of *any* and *all* constitutional rights") (emphasis in original).

The courts that have determined that Section 1983 does not provide a cause of action for violations of the Commerce Clause have rested that conclusion on the view that the Commerce Clause allocates power between the federal government and the states, and does not secure individual rights within the meaning

of Section 1983. See, *e.g.*, *Consolidated Freightways*, 730 F.2d 1144-1145. This Court's decision in *United States* v. *Guest*, 383 U.S. 745 (1966), significantly undermines that conclusion. One question in that case was whether an indictment charging a conspiracy to deprive citizens of the "right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce" stated a violation of 18 U.S.C. § 241, which criminalizes conspiracies to intimidate the exercise of "any right or privilege secured * * * by the Constitution." Relying principally on the Commerce Clause as the source of the constitutional right to travel, this Court upheld the indictment on the ground that it alleged a conspiracy to deprive citizens of a right secured by the Constitution. 383 U.S. at 757-759. *Guest* thus establishes that the Commerce Clause secures rights cognizable under Section 1983.

More fundamentally, there is no reason why each provision of the Constitution must be classified as either creating rights or allocating authority in order to serve structural ends. In fact, of course, a single provision of the Constitution may serve *both* purposes. The right of individuals under the Commerce Clause to participate in a national market free of discriminatory or burdensome state regulation is both a structural rule, allocating regulatory authority between the federal and state governments, and a personal right, freeing all individuals from discriminatory state regulation not authorized by Congress. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (recognizing a "right" of constitutional dimensions to engage in "intercourse between state and state"). This right, which is fundamental to the national citizenship that the Constitution was established to secure, surely is protected by Section 1983.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1990

No. 89-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents.

On Writ of Certiorari
to the Supreme Court of Nebraska

JOINT APPENDIX

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Certiorari Granted May 29, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Note: A number of documents that are relevant to this appeal were printed and filed with the Petition for Certiorari. Pursuant to Rule 33.1, they are not being reprinted in this Appendix. However, for the use and convenience of the Court, the documents and the page at which they may be found in the Appendix to the Petition, are set out below.

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Case Action Summary
Supreme Court of Nebraska

Mark E. Dennis v. State of Nebraska 88-205

2/26/88	Bill of Exceptions filed by Appellant Mark E. Dennis.
3/4/88	Appeal filed by Appellant.
6/14/88	Brief filed by Appellant.
6/24/88	Replacement Brief filed by Appellant.
8/24/88	Brief filed by Appellee State of Nebraska.
10/12/88	Reply Brief filed by Appellant.
1/10/90	Oral Argument heard.
2/16/90	Published Opinion filed. Affirmed in Part, and in Part Reversed. Boslaugh, J.

Civil Docket
District Court for Lancaster County, Nebraska

Private Truck Council of America and Dennis Trucking v. State of Nebraska 390-26

1/25/85	Petition (Equity) filed by Plaintiff Private Truck Council of America and Dennis Trucking. Case transferred from District Court for Douglas County, Nebraska on Motion for Change of Venue by Defendant State of Nebraska, et al.
2/6/85	Motion of Plaintiff to Certify the Class filed.
3/7/85	Motion of Plaintiff for Summary Judgment filed.
3/13/85	Motion of Defendants to Strike Plaintiff's Motion for Summary Judgment filed.
3/18/85	Motion of Plaintiff for Summary Judgment (3/7/85) stricken as premature.
3/22/85	Affidavit of Marion Sexton filed.
6/17/85	Order Granting Defendants' Demurrers and Denying Class Certification filed.
7/16/85	First Amended Petition filed by Plaintiff.
7/16/85	Motion of Plaintiff to Certify the Class filed.
8/15/85	Motion of Defendants to Strike filed.
8/27/85	Motion of Defendants to Strike Plaintiff's Motion to Certify Class filed.
8/28/85	Opposition of Plaintiff to Defendants' Motion to Strike filed.
8/30/85	Motion of Defendants to Strike Plaintiff's Motion to Certify the Class filed.
11/19/85	Order Overruling Motion of Plaintiff to Certify the Class filed.

12/6/85	Second Amended Petition filed by Plaintiff.
12/19/85	Answer to Second Amended Petition filed by Defendants.
12/20/85	Motion of Defendants for Summary Judgment filed.
3/5/86	Cross-Motion of Plaintiff for Summary Judgment filed.
3/13/86	Stipulation of Parties filed.
6/3/86	Each party's Motion for Summary Judgment overruled.
6/3/87	Trial held.
9/30/87	Order on Plaintiff's Second Amended Petition filed.
10/13/87	Motion of Plaintiff for New Trial filed.
1/29/88	Plaintiff's Motion for New Trial overruled.
2/26/88	Notice of Appeal filed by Plaintiff.

Civil Docket
District Court for Douglas County, Nebraska

Private Truck Council of America
v. State of Nebraska

12/17/84	Petition (Equity) filed by Plaintiff Private Truck Council of America.
12/27/84	Memorandum of Law in Support of Motion by Plaintiff for Preliminary Injunction or, in the Alternative, to Require Placement of Collected Funds in Escrow filed.
12/27/84	Affidavit of Janis Dennis in support of Plaintiff's Motion (of the same date) filed.
1/15/85	Supplemental Memorandum of Law in Support of Motion by Plaintiff for Preliminary Injunction or, in the Alternative, to Require Placement of Collected Funds in Escrow filed.
1/15/85	Demurrer and Motion of Defendants for Change of Venue filed.
1/21/85	Motion of Defendants for Change of Venue sustained; case transferred to District Court for Lancaster County, Nebraska.

IN THE DISTRICT COURT OF DOUGLAS COUNTY
STATE OF NEBRASKA

Doc. ___ No. ___

PETITION
(EQUITY)

PRIVATE TRUCK COUNCIL OF AMERICA, INC.,

and

DENNIS TRUCKING,

On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

STATE OF NEBRASKA,

and

HOLLY JENSEN, Individually and as Director, Nebraska Department of Motor Vehicles,

and

LOU LAMBERTY, Individually and as Director, Nebraska Department of Roads,

and

KAY ORR, Individually and as Nebraska State Treasurer,

Defendants,

---

1. This is an action for a declaratory judgment pursuant to Neb. Rev. Stat. §25-21,149 *et seq.* to declare retaliatory taxes imposed by Neb. Rev. Stat. §§60-305.02 and 60-305.03 unconstitutional, and to enjoin the defendants from

enforcing and collecting the tax, and to obtain refunds of all taxes unlawfully exacted.

PARTIES

2. Plaintiff Private Truck Council of America, Inc. (PTCA), is a nonprofit business association incorporated under the laws of New York State. It has its principal place of business in Washington, D.C. PTCA is comprised of over 1,800 companies presently operating trucks and related equipment as private carriers within the scope and in furtherance of their own manufacturing, processing or other businesses, and associated companies. A large number of PTCA's member companies, operating thousands of vehicles in interstate commerce through the State of Nebraska, register their vehicles in states against which Nebraska retaliates under the authority contained in Sections 60-305.02 and 60-305.03. As such, these companies have been or will be required to pay the reciprocity fees imposed by the defendants.

3. Plaintiff Dennis Trucking is an unincorporated motor carrier with its principal place of business in Ohio. It is an owner of a nonresident vehicle for purposes of the taxes and fees imposed under Sections 60-305.02 and 60-305.03, which vehicle is duly authorized to operate in the State of Nebraska.

4. The defendants are the State of Nebraska and various individual State officials responsible for the implementation, collection, and administration of the retaliatory taxes and fees at issue in this case. Defendant Holly Jensen is the Director of Motor Vehicles. The Department of Motor Vehicles is the State agency which has authority, pursuant to Neb. Rev. Stat. §§60-305.02 and 60-305.03, to implement the retaliatory taxes and fees authorized in those sections. The Department of Motor Vehicles is also the State agency which assesses and enforces those retaliatory taxes and fees.

5. Defendant Lou Lamberty is the Director of the Department of Roads. The Department of Roads is the State agency which has authority, pursuant to Neb. Rev. Stat. §60-305.03(1), to act as agent for the Department of Motor Vehicles in collecting the retaliatory taxes and fees being challenged in this case.

6. Defendant Kay Orr is the State Treasurer of Nebraska. The State Treasurer is directed, pursuant to Neb. Rev. Stat. §60-305.03, to place the proceeds of the retaliatory taxes and fees at issue in this case in the Highway Cash Fund.

THE CLASS

7. Pursuant to Neb. Rev. Stat. §25-319, plaintiffs bring this action on behalf of themselves and all other vehicle owners which have operated or will operate vehicles through the State of Nebraska which are registered in states against which Nebraska retaliates pursuant to Sections 60-305.02 and 60-305.03, and which have therefore paid or will be required to pay the retaliatory taxes and fees imposed under those sections. The parties comprising the plaintiff class include hundreds of interstate motor carriers and thus are so numerous as to make joinder of all impracticable. In addition, the claims of law and fact are common to all members of the class.

JURISDICTION

8. This Court has jurisdiction over this action under Article V, §9 of the Nebraska Constitution and Neb. Rev. Stat. §24-302.

FACTS

9. The State of Nebraska requires Nebraska resident motor carriers who own trucks and related equipment to register that equipment with the State and pay an annual

registration fee therefor. Non-resident motor carriers from 30 states pay a pro-rated annual registration fee to Nebraska through the International Registration Plan (IRP). Under the IRP, a carrier pays a registration fee solely to its base state, which fee is then divided between the other member states in which it operates. Nonresident motor carriers from all non-IRP states pay pro-rated annual registration fees to Nebraska under various reciprocity agreements, or are permitted to operate in Nebraska without payment of an annual fee pursuant to a reciprocity agreement. Thus, carriers from all states, including Nebraska, must in some manner fulfill Nebraska's registration requirements.

10. Nebraska also imposes a fuel tax on the consumption of motor fuel within the State. This tax is based on the percentage of a carrier's mileage in Nebraska and the amount of fuel consumed within the State. The fuel tax is paid by all motor carriers, including Nebraska-based carriers, regardless of their state of registration.

11. In addition to registration fees and fuel taxes described in paragraphs 9 and 10, Nebraska imposes a "retaliatory" tax solely on owner of motor vehicles registered in other states as follows:

> Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska, entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks, truck-tractors, semitrailers, trailers, or buses, and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks, truck-tractors, semitrailers, trailers, or buses, owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, in which such trucks, truck-tractors, semitrailers,

> trailers, or buses are domiciled, grant reciprocity comparable to that extended by the laws of Nebraska.

Neb. Rev. Sat. §60-305.02.

12. The statute further provides:

> In case a foreign state or territory is not reciprocal as to license fees on commercial trucks, truck-tractors, semitrailers, trailers, or buses, the owners of such nonresident vehicles from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks, truck-tractors, semitrailers, trailers, or buses, other than license fees, and the reciprocity law of any other foreign state or territory does not act to exempt Nebraska trucks, truck-tractors, semitrailers, trailers, or buses operating in that state from payment of all fees whatsoever, the owners of such foreign trucks, truck-tractors, semitrailers, trailers, or buses shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks, truck-tractors, semitrailers, trailers, or buses; . . .

Neb. Rev. Stat. §60-305.03.

13. Sections 60-305.02 and 60-305.03 authorize the Nebraska Department of Motor Vehicles to monitor the taxes and fees imposed on Nebraska carriers by other states and to implement retaliatory taxes and fees against carriers whose vehicles are registered in other states as it sees fit. The Department of Roads is authorized to collect the taxes and fees. The statutes further provide that the proceeds of the retaliatory taxes and fees collected under Sections 60-305.02 and 60-305.03 shall be remitted to the State

Treasurer, who shall in turn place the money in the Highway Cash Fund.

14. The Nebraska Department of Motor Vehicles has implemented Sections 60-305.02 and 60-305.03 by imposing retaliatory taxes and fees on motor carriers whose vehicles are registered in any one or more of nine states. Thus, motor carriers whose vehicles are registered in Arkansas, Pennsylvania, Arizona, Oregon, Idaho, Nevada, Wyoming, Ohio, and New York must, in addition to registration fees and fuel taxes, pay retaliatory taxes and fees to the Department of Roads. The 1984 Reciprocity Manual of the Department of Motor Vehicles and various memoranda of the Department setting forth the amounts of these fees are attached hereto as Exhibit A.

15. Motor carriers whose vehicles are registered in Nebraska pay no fees or taxes pursuant to Sections 60-305.02 and 60-305.03 for their use of the State's roads.

16. Plaintiff Dennis Trucking ("Dennis") owns one vehicle, which is registered in the State of Ohio. On November 17, 1984 Dennis paid the State of Nebraska a retaliatory tax of two cents per mile, or $9.00, pursuant to Sections 60-305.02 and 60-305.03. See Exhibit B hereto. On November 2, 1983, Dennis paid a retaliatory tax of two cents per mile, or $9.00. See Exhibit C. Dennis continues to operate in Nebraska, and therefore will continue to be subject to the retaliatory taxes imposed pursuant to Sections 60-305.02 and 60-305.03.

COUNT I

Unlawful Burden On Interstate Commerce

17. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 16 as if fully set forth herein.

18. The retaliatory taxes and fees imposed on plaintiffs and the plaintiff class pursuant to Sections 60-305.02 and

60.305.03 constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution because they are imposed only on motor carriers whose vehicles are registered outside the State of Nebraska, while no comparable tax or fee is imposed on carriers whose vehicles are registered in the State of Nebraska. As such, the State by its taxing scheme favors domestic enterprises over enterprises from other states. Nebraska's retaliatory taxes and fees further impose an unlawful burden on interstate commerce because they vary in amount depending on the particular state of registration. On their face, therefore, the taxes and fees discriminate against interstate commerce. Moreover, the amount of the taxes and fees does not bear a reasonable relationship to the services provided by the State in connection therewith.

COUNT II

Denial of Privileges and Immunities

19. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 16 as if fully set forth herein.

20. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.03 constitute a denial of the privileges and immunities of plaintiffs and the plaintiff class, whose vehicles are registered outside the State of Nebraska, because they are imposed based on the taxpayers' residence in another state. No comparable tax is imposed on residents of Nebraska. Accordingly, these taxes discriminate against nonresidents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution.

COUNT III

Nebraska Constitution

21. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 16 as if fully set forth herein.

22. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.02 constitute a grant by the legislature of special and exclusive privileges, immunities, and franchises to corporations, associations, and individuals operating motor vehicles registered in Nebraska. They therefore violate Article III, Section 18 of the Constitution of the State of Nebraska.

COUNT IV

42 U.S.C. §1983

23. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 16 as if fully set forth herein.

24. The actions of defendants set forth in Counts I and II above have been and will continue to be taken under color of state law, custom and usage and threaten to deprive plaintiffs of rights secured to them by the United States Constitution. Defendants are therefore liable to plaintiffs pursuant to 42 U.S.C. §1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court grant them:

(a) A declaratory judgment pursuant to Neb. Rev. Stat. §25-21,149 declaring that the retaliatory taxes and fees authorized by Neb. Rev. Stat. §§60-305.02 and 60-305.03 violate the United States Constitution, the Nebraska Constitution, and federal law, and are therefore null and void;

(b) A permanent injunction enjoining the defendants from assessing or collecting retaliatory taxes and fees on nonresident motor carriers under Neb. Rev. Stat. §§60-305.02 and 60-305.03;

(c) Refunds of all retaliatory taxes and fees collected by the defendants pursuant to Neb. Rev. Stat. §§60-305.02 and 60-305.03 prior to the effectiveness of this Court's judgment, with interest;

(d) Attorneys' fees and costs of this action; and

(e) Such other and further relief as this Court may deem just.

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EXHIBIT A

1984 RECIPROCITY MANUAL

INTERSTATE REGISTRATION SECTION

DEPARTMENT OF MOTOR VEHICLES

Nebraska is currently a member of the following apportioned registration agreements:

INTERNATIONAL REGISTRATION PLAN

Alabama	Iowa	Mississippi	Oregon	Utah
Alberta	Illinois	Missouri	Oklahoma	Virginia
Arizona	Kansas	Montana	Pennsylvania	Wisconsin
Arkansas	Kentucky	Nebraska	South Dakota	Wyoming
Colorado	Louisiana	North Dakota	Tennessee	
Idaho	Minnesota	North Carolina	Texas	

UNIFORM PRORATE AND RECIPROCITY AGREEMENT

Alaska	California	New Mexico
British Columbia	Nevada	Washington

Any carrier engaged in operating a fleet of one of more apportionable vehicles in the State of Nebraska may, in lieu of full county registration, license such a fleet under the apportioned registration laws of the State of Nebraska.

An apportionable vehicle shall mean any vehicle except recreational vehicles, vehicles displaying restricted plates, city pick up and delivery vehicles, buses used in transportation of chartered parties, and government owned vehicles, used in two or more jurisdictions that allocate or proportionally register vehicles and is used for the transportation of persons, for hire, or designed, used or maintained primarily for the transportation of property and:

1. is a power unit having a gross weight in excess of 26,000 pounds,

2. is a power unit having three or more axles (on the ground), regardless of weight, or
3. is used in combinations when weight of such combination exceeds 26,000 pounds gross vehicle weight.

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Alabama			$10	80000	none	CGW	9/30	11/16	9/30	11/16	no[1]	yes
Alaska			$10	95000	none	unladen	12/31	6/1	monthly	none	no	yes
Arizona		[4]	$10ST $20CU[2]	80000	none	CGW	12/31	3/1	monthly	none	no	no
Arkansas			$25[1]	80000[2]	1000	CGW	6/30	8/1	monthly	none	no	no
California			$45	80000	none	unladen	12/31	3/1	monthly	none	yes	no
Colorado		$10[1]	$25	80000	none	unladen	12/31	3/1	12/31	3/1	no	no
Connecticut	X			80000	2% lic. wt.	CGW	4/30	5/1	monthly	none	no	yes
Delaware	X			80000	none	CGW	Stag	Stag			no	yes
Dt of Columbia	X			79000	none	CGW	3/31	4/1	3/31	4/1	no	yes
Florida	X			80000	none	CGW	Stag	Stag	Stag	none	no	yes
Georgia	X			80000	none	CGW	12/31	4/2	12/31	4/2	no	yes
Hawaii	X			80800	none	net load	12/31	4/1	12/31	4/1	no	no
Idaho			$5 + .03 /mile	80000	none	CGW	12/31	3/1	monthly	none	no	no
Illinois			$10	80000	none	CGW	12/31	3/1	12/31	[1]	no	no
Indiana	X			80000	none	CGW	2/28	3/1	monthly	none	no	yes
Iowa			$10	80000	*	CGW	12/31	3/15	12/31	3/16	no	no
Kansas			$20	80000	none	CGW	12/31	3/1	[1]	[2]	yes	no
Kentucky			$25	80000	none	CGW	3/31	4/1	monthly	none	no	no
Louisiana			$25	80000	5% lic. wt.	CGW	3/31	4/1	monthly	none	no	yes
Maine	X			80000	**	CGW	12/31	3/1	monthly	none	no	yes
Maryland	X			80000	none	CGW	4/30	5/1	3/31	4/1	no	yes
Massachusetts				80000	none	CGW	12/31	1/1	monthly	none	no	yes

* 5% on non-agricultural, 25% on agricultural
** 10% less than 15,000; 5% greater than 15,000

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Michigan	X			80000	none	CGW	2/28	3/1	3/31	4/1	no	yes
Minnesota			$10	80000	none	CGW	12/31	3/2	monthly	none	no	no
Mississippi	ADD MS as Recip. See X4-13 on Farm Plated Vehicles		$10	80000	none[1]	CGW	10/31	11/1	monthly	[3]	no	yes
Missouri			$10	80000	none	CGW	12/31	3/1	monthly	none	no	yes
Montana			$10 ST $15 CU	80000	none	CGW	12/31	2/16	monthly	none	no	yes
Nevada			$10 + mileage $.02 ST $.04 CU	80000	none	unladen	12/31	2/1	monthly	none	no	no

New Hampshire	X			80000	5% lic. wt.	CGW	3/31	4/1	monthly	none	no	yes
New Jersey	X			80000	none	CGW	3/31	4/1	monthly	none	no	yes
New Mexico			$15 ST $25 CU	86400	none	CGW	12/31	3/3	12/31	3/3	no	no
New York	X [1]	$5 ST 10 CU + mile [2]	$5 ST $10 CU + mile [3]	80000	none	CGW	Stag	Stag	monthly	none	no[1]	no
North Carolina			$15	80000	5%	CGW	12/31	2/16	12/31	2/16	yes	no
North Dakota			$20	80000	none	CGW	12/31	2/2	3/31	5/1	no	yes
Ohio	X [1]	$.01 ST $.02CU [3]	$.01 ST $.02 CU [4]	80000	none	CGW	12/31	3/2	monthly	none	no[1]	no
Oklahoma			$12	80000	none	CGW	12/31	3/2	monthly	none	no	yes
Oregon			$10 + mile[5]	80000	none	gross wt	12/31	3/15	monthly	none	no	yes
Pennsylvania			$15[6]	80000	*	CGW	5/31	6/1	3/31	4/1	no	yes
Rhode Island	X			80000	none	CGW	3/31	4/1	3/31	4/1	no	yes

* 3% on state highways; none on interstate system

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
South Carolina	X			80000	none	net load	11/15	12/1	monthly	none	yes	yes
South Dakota			$15 ST $25 CU	80000	5%	CGW	12/31	4/1	3/31	4/1	no	no
Tennessee			$20	80000	none	CGW	3/31	4/15	monthly	none	no	no
Texas			$25	80000	none	CGW	3/31	4/1	monthly	none	yes	yes
Utah			$10 ST $15 CU	80000	none	CGW	12/31	3/1	monthly	none	no	no
Vermont	X			80000	none	CGW	4/40	5/1	2/28	3/1	no	yes

Virginia			$15	80000	5% lic.wt.	CGW	2/28	4/1	monthly	none	no	yes
Washington			$15 ST $25 CU	80000	none	CGW	12/31	3/1	monthly	none	no	yes
West Virginia	X			80000	5% lic.wt.	CGW	6/30	7/1	monthly	none	no	yes
Wisconsin			$10	80000	none	CGW	12/31	3/1	monthly	none	no	no
Wyoming			$10 + mileage .015 ST .030 CU	80000	none	unladen	12/31	3/1	12/31	3/1	yes	no
Alberta			$10	80000[1]	10000	CGW	3/31	5/1	3/31	4/30	no	yes
British Columbia			$10	80000	none	CGW	2/28	3/1	2/28	3/1	no	no
Manitoba	X			80000	none	CGW	2/28	3/1	2/28	3/1	no	yes
New Brunswick		$10	$10	80000	none	CGW	12/31	4/1	12/31	4/1	no	no
New Foundland		$10	$10	73280	none	CGW	3/31	5/1	3/31	4/1	no	no
Nova Scotia	X			80000	none	CGW	2/28	3/1	12/31	4/1	no	yes
Ontario	X			80000	none	CGW	12/31	4/1	12/31	2/28	no	yes
Prince Ed Isld		$10	$10	74000	none	CGW	3/31	4/1	3/31	[4]	no	no

	COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII	
		Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity	
Mexico	X [2]		$10 + .05/ mile	$10 + mileage [7]	74000	none	CGW	4/30	5/1	4/30	5/1	no	no	
Saskatchewan														
Quebec			$10	$10	80000	none	CGW	2/28	3/1	2/28	3/1	no	no	

CHART EXPLANATIONS

COLUMN I.

Vehicles properly registered in these jurisdictions shall be granted full license reciprocity on interstate operations provided the vehicle is properly registered. Properly registered shall mean a vehicle licensed or registered in one of the following:

- The jurisdiction where the person registering the vehicle has his/her legal residence, or
- The jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled, and the vehicle is assigned to such principal place of business, or
- The jurisdiction where, because of an agreement or arrangement between two or more jurisdictions, or pursuant to a declaration, the person registering the commercial vehicle has licensed the vehicle as required by said jurisdiction.

Any vehicle not properly registered as defined above shall be subject to purchasing a Trip Permit based upon the jurisdiction determined as the "principal place of business".

EXCEPTIONS:

1. Vehicles properly registered in *New York* and *Ohio* shall be required to purchase a Trip Permit and/or Mileage Permit. *New York* household goods carriers are exempt from Trip Permit and Mileage Permit fees up to 71,000 pounds.
2. *Mexico* - Vehicles properly registered in Mexico and used for private use will be given full license reciprocity

on interstate movement. However, if the vehicle is being used commercially, the owner will be required to purchase a Nebraska Non-Resident Commercial Registration from the County Treasurer.

COLUMN II.

The Trip Permit fees are indicated for each jurisdiction and the permit is valid for 72 hours or for a single trip into the state. *The Trip Permit does not allow intrastate movement.* For purposes of the chart:

CU = Combinations of tractor semitrailers
ST = Straight trucks pulling any type of trailer

1. *Colorado* - Any non-apportioned power unit or combination of vehicles grossing 10,000 pounds or more but not exceeding 26,000 pounds will be required to purchase a Trip Permit for $10.

2. *New York* - Straight Trucks..... $ 5.00
   Tractor Trailer Combination..... $10.00
   Plus: 18,001-28,000 ..... $.010 per mile
   28,001-38,000 ..... .015 per mile
   38,001-48,000 ..... .020 per mile
   48,001-58,000 ..... .025 per mile
   58,001-68,000 ..... .030 per mile
   68,001-78,000 ..... .035 per mile

3. *Ohio* - Straight Trucks..... $.01 per mile
   Tractor Trailer Combination..... $.02 per mile

4. *Arizona* - A non-apportioned Arizona vehicle having a combined gross weight of 12,000-26,000 pounds will be required to purchase an Arizona Motor Carrier Trip Permit at the following rates for each trip:

   $12 - Up to 50 miles
   $48 - More than 50 miles

COLUMN III.

The Trip Permit fees are indicated for each jurisdiction and the permit is valid for 72 hours or for a single trip into the state. *The Trip Permit does not allow intrastate movement.* For purposes of the chart:

CU = Combinations of tractor semitrailers
ST = Straight trucks pulling any type of trailer

1. *Arkansas* - Maximum weight of Arkansas based vehicles allowed in Nebraska is 73,280 pounds without a Reciprocity Permit. These permits allow the vehicle to carry 80,000 pounds at an annual fee of $175 per vehicle and applies to both apportioned and non-apportioned vehicles. In lieu of the Reciprocity Permit, a mileage fee of $.05 per mile travelled in Nebraska may be purchased.

2. *Arizona* - A non-apportioned Arizona vehicle having a combined gross weight of more than 26,000 pounds will be required to purchase a Trip Permit *plus* an Arizona Motor Carrier Trip Permit at the following rates for each trip:

   $12 - Up to 50 miles
   $48 - More than 50 miles

   New York - Straight Trucks ..... $ 5.00
   Tractor Trailer Combination..... $10.00
   Plus: 18,001-28,000..... $.010 per mile
   28,001-38,000..... .015 per mile
   38,001-48,000..... .020 per mile
   48,001-58,000..... .025 per mile
   58,001-68,000..... .030 per mile
   68,001-80,000..... .035 per mile

4. *Ohio* - Straight Trucks..... $.01 per mile
   Tractor Trailer Combination..... $.02 per mile

5. *Oregon* - 26,001-38,000 ..... $.03 per mile
   38,001-52,000 ..... $.04 per mile
   52,001-80,000 ..... $.05 per mile
6. *Pennsylvania* - Apportioned and non-apportioned vehicles based in Pennsylvania grossing in excess of 26,000 are required to pay a Reciprocity Permit fee of $36 per axle for travel into and thru Nebraska. In lieu of the Reciprocity Permit, a fee of $15 will be assessed for each trip into Nebraska. Non-apportioned vehicles will be required to purchase a $15 Trip Permit in addition to the Reciprocity Permit.
7. *Saskatchewan* - 26,001-50,000..... $.10 per mile
   50,001-74,000..... $.15 per mile

COLUMN IV.

1. *Alberta* - Metric Conversion for 1 Kilogram = 2.2046 pounds.
2. *Arkansas* - Maximum weight of Arkansas based vehicles allowed in Nebraska is 73,280 without a Reciprocity Permit. These permits allow the vehicle to carry 80,000 pounds at an annual fee of $175 per vehicle and applies to both apportioned and non-apportioned vehicles.

COLUMN V.

1. *Mississippi* - No tolerance (except 2,000 pounds tolerance on liquified compressed gas).

COLUMN IX.

1. *Kansas* - December 31 is the passenger vehicle expiration date *except* for staggered registrations which expire the last day of expiration month.

COLUMN X.

1. *Illinois* - Changes each year but not beyond March 1.
2. *Kansas* - Staggered registrations with no extensions.
   Others - February 16 with March 1 enforcement date.

3. *Mississippi* - Enforcement date of the 16th of the month following the month of expiration.
4. *Prince Edward Island* - Discretion of the Minister with a maximum of 30 days.

COLUMN XI.

1. *Alabama, New York, and Ohio* - These residents attending an accredited school in Nebraska will *not* be required to obtain a Nebraska plate and registration while in attendance at that institution.

DEPARTMENT OF MOTOR VEHICLES
STATE OF NEBRASKA
LINCOLN 68509
(402) 471-2281

MEMORANDUM

TO: All Carrier Enforcement Officers
FROM: Interstate Registration Section
DATE: October 27, 1982
SUBJECT: Arizona Motor Carrier Permit

Effective November 1, 1982, Nebraska will begin charging Arizona based vehicles a Motor Carrier Permit comparable to the permit fee being charged to Nebraska based vehicles operating in Arizona.

The permit fee is to be charged on all vehicles having a combined gross weight of more than 12,000 pounds, including apportioned carriers.

An apportioned vehicle having a combined gross weight of 12,000 pounds or more will be required to purchase an Arizona Motor Carrier Permit only. A non-apportioned vehicle having a combined gross weight of 12,000 to 26,000 pounds will be required to purchase an Arizona Motor Carrier Permit only. A non-apportioned vehicle having a combined gross weight of more than 26,000 pounds will be required to purchase a Prorate Trip Permit *plus* an Arizona Motor Carrier Permit.

MOTOR CARRIER PERMIT FEES:
$12 for up to 50 miles operated on Nebraska Highways
$48 for more than 50 miles operated on Nebraska Highways

Effective January 1, 1983, carriers not obtaining the Motor Carrier Permit should be cited for violation of Nebraska Statute 60-305.02.

If you have any questions, please feel free to call me at 402-471-3891.

ARKANSAS

TRUCKS AND BUSES

An Arkansas licensed vehicle (prorated or non-prorated) licensed or grossing in excess of *73,280 pounds* not displaying reciprocity decal from Nebraska on side of vehicle must purchase a 5¢ a mile trip permit. *This is in addition to the 72 hour $25.00 prorate permit if vehicle is not prorated with Nebraska.*

A vehicle regardless of State of license, leased to an operator from Arkansas, that has a vehicle or combination of vehicles, that grosses in excess of 26,000 pounds empty or loaded, or any power unit with three (3) axles or more regardless of weight, if not prorated with Nebraska, must purchase a 72 hour $25.00 prorate permit.

FARM PLATES

Note: Farm plated truck tractors shall be treated the same as commercial licensed vehicles for trip permit purpose.

SEE ATTACHMENTS

PENNSYLVANIA

TRUCKS AND BUSES

A *Pennsylvania licensed vehicle* (prorated or non-prorated) licensed or grossing in excess of 26,000 pounds not displaying reciprocity decal from Nebraska on side of vehicle must purchase a $15.00 trip permit. *This is in addition to a $15.00 72 hour prorate permit if vehicle is not prorated with Nebraska.*

A vehicle regardless of State of license, leased to an operator from Pennsylvania that has a vehicle having three (3) axles or more on the power unit or grossing in excess of 26,000 pounds, empty or loaded, must prorate with Nebraska or purchase a 72 hour $15.00 prorate permit.

NOTE - FARM PLATE

Farm plated Pennsylvania trucks and farm plated truck-tractor combinations do not need prorate or reciprocity permits of any kind.

SEE ATTACHMENT

NEBRASKA RECIPROCITY QUALIFICATIONS

YEAR 19____

PENNSYLVANIA Complete Sections A & B

Nebraska requires the payment of a $36 per axle fee on Pennsylvania plated vehicles having a combined gross weight or registered combined gross weight in excess of 26,000 pounds, used on Nebraska highways and which are required to be registered for operation in Nebraska.

Carriers using truck tractors and combinations need to anticipate the number of axles that will be used in combination during the year. For the purpose of this tax, the front wheels on any vehicle are considered to be on an axle.

ARKANSAS Complete Sections A & C

Nebraska requires the payment of an annual $175 fee on Arkansas plated vehicles having a combined gross weight or registered combined gross weight in excess of 73,280 pounds used on Nebraska highways.

SECTION A

Name		IRP Account #	
Address	City	State	Zip Code

SECTION B

Indicate number of stickers required in each category.

Number of Vehicles	Number of Axles By Category	Amount Due By Category	STATE OFFICE USE ONLY
3 axles ____	x 3 ____	x $36 = $____	3 axles____
4 axles ____	x 4 ____	x $36 = $____	4 axles____
5 axles ____	x 5 ____	x $36 = $____	5 axles____
6 axles ____	x 6 ____	x $36 = $____	6 axles____
	Total Axles	Total Due	Date____ Check ___ DC ___ Cash ___ Check/DC #____

SECTION C

____ x $175 = $____
Number of Stickers — Total Fees Due

ALL CHECKS NEED TO BE CERTIFIED. Return to
Department of Motor Vehicles
Interstate Registration Section
P. O. Box 94789
Lincoln, NE 68509

STATE OFFICE USE ONLY
Sticker #'s____ Date____ Check ___ DC ___ Cash ___ Check/DC #____

OMV-03-1
11-83

EXHIBIT B

Nebraska Trip Permits for 1983 & 1984

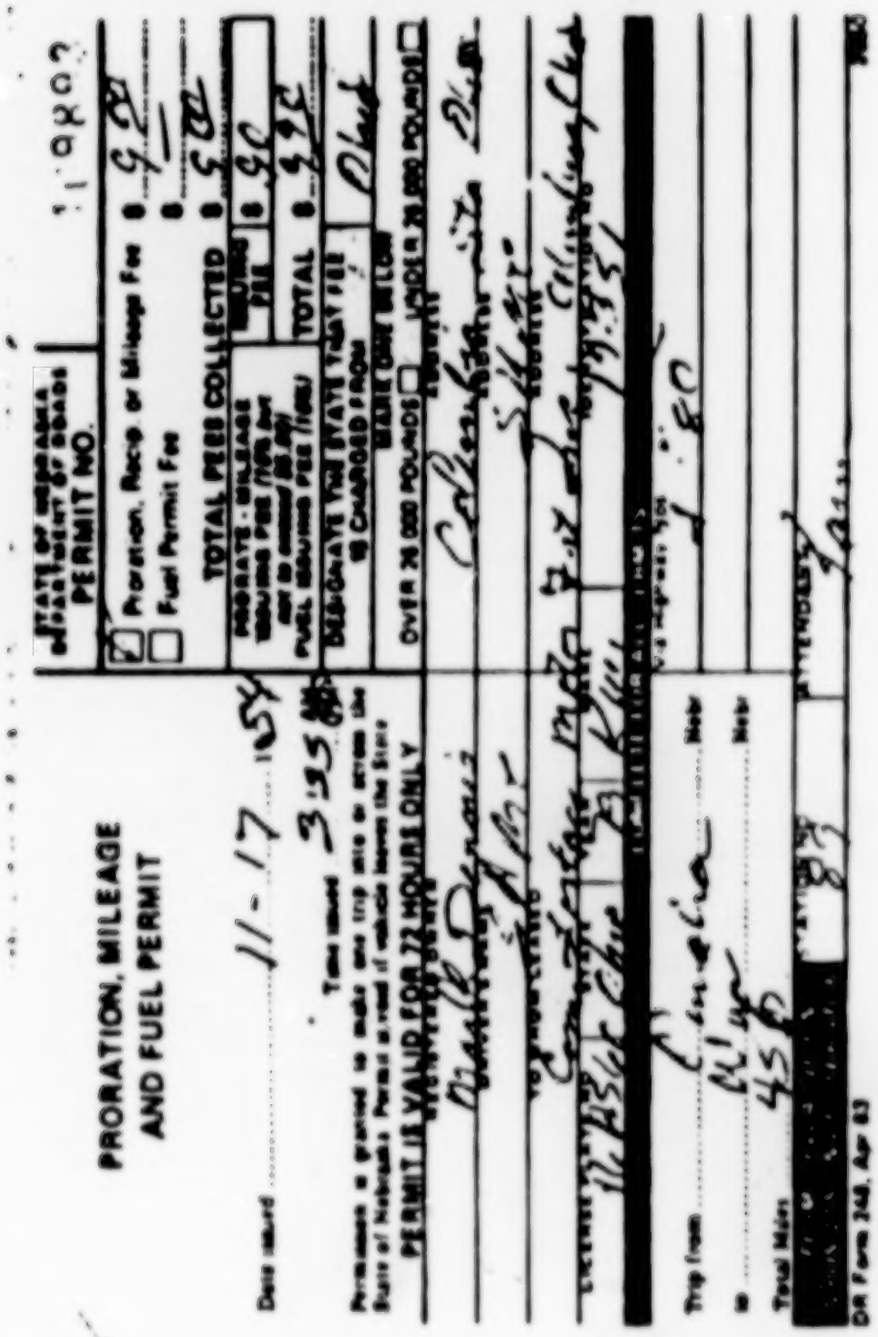
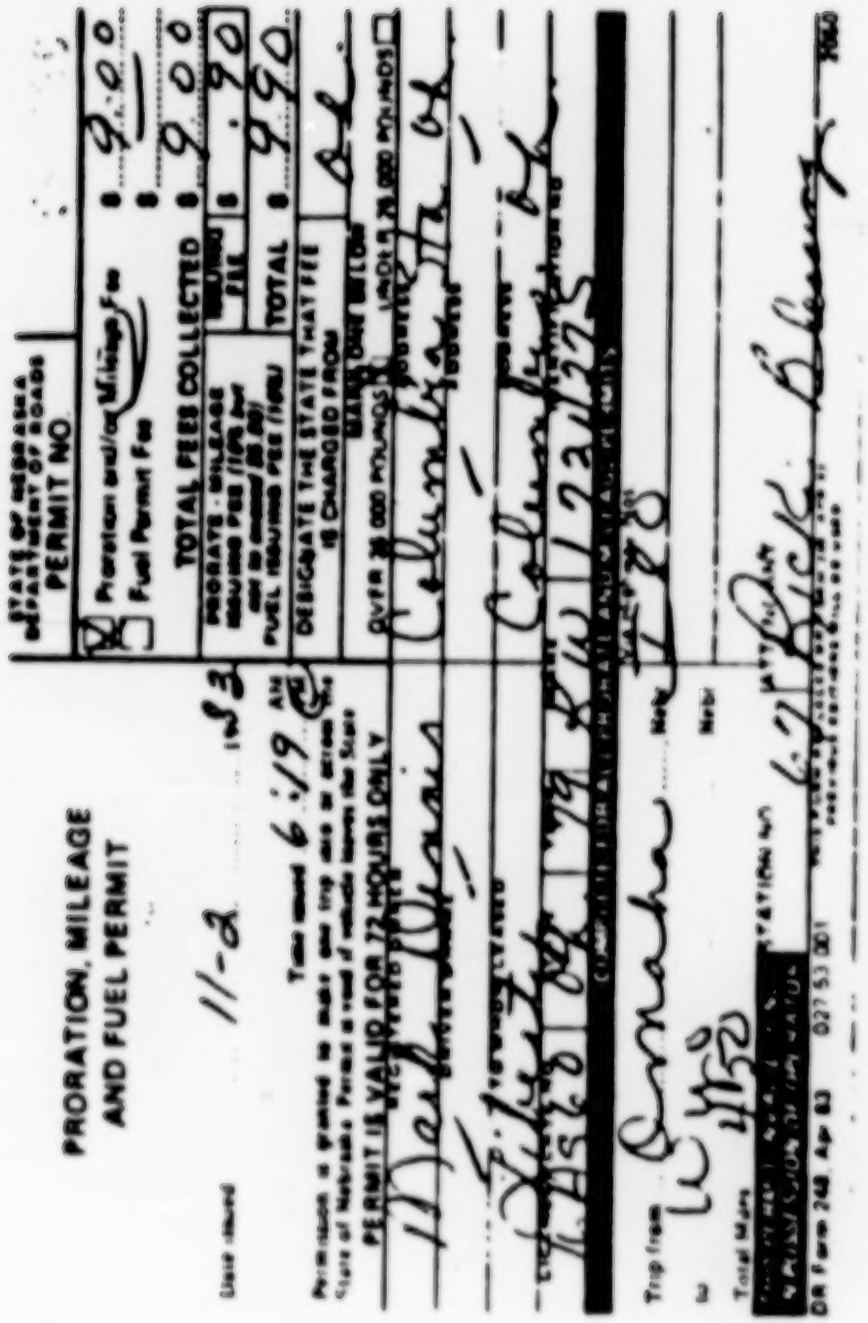


EXHIBIT C



IN THE DISTRICT COURT OF DOUGLAS COUNTY
STATE OF NEBRASKA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*

On Behalf of Themselves and All Others Similarly Situated,
Plaintiffs,

v.

STATE OF NEBRASKA, *et al.*,
Defendants.

MOTION FOR PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE TO REQUIRE PLACEMENT OF TAX COLLECTIONS IN ESCROW

Plaintiffs hereby move this Court, pursuant to Neb. Rev. Stat. § 25-1063, for a preliminary injunction prohibiting the defendants from assessing or collecting taxes and fees on motor carriers pursuant to Neb. Rev. Stat. §§ 60-305.02 and 60-305.03, the validity of which is challenged in this action. In the alternative, plaintiffs move for an order prohibiting the defendants from disbursing the proceeds of taxes and fees collected pursuant to those sections and instead ordering the defendants to place said funds in an interest-bearing escrow account pending the resolution of this case.

As discussed more fully in the accompanying memorandum of points and authorities, this motion should be granted because plaintiffs are likely to succeed in the merits of their complaint; they will suffer irreparable injury if the Court does not grant this motion; and such injury outweighs any harm granting the injunction would inflict on the defendants.

Respectfully submitted,

/s/ Richard A. Allen

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IN THE DISTRICT COURT OF DOUGLAS COUNTY
STATE OF NEBRASKA

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*

On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

STATE OF NEBRASKA, *et al.*,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, TO REQUIRE PLACEMENT OF COLLECTED FUNDS IN ESCROW

Plaintiffs submit this memorandum in support of their accompanying motion for a preliminary injunction prohibiting the defendants, pending this litigation, from collecting or enforcing the retaliatory fees and taxes the constitutionality of which plaintiffs challenge in this case. This motion should be granted because, as shown below, plaintiffs' likelihood of success on the merits is clear. The challenged fees and taxes, which apply only to motor carriers based in certain other states and not to Nebraska-based carriers, violate fundamental constitutional principles recently confirmed by the United States Supreme Court and other courts in striking down similarly discriminatory fees and taxes on out-of-state businesses, including motor carriers. Furthermore, as shown in the accompanying affidavits, payment of these fees and taxes during the litigation will impose irreparable burdens and costs on the out-of-state motor carriers that must pay them in order to operate in Nebraska (in competition with Nebraska-based carriers that do not have to pay them), even if those payments are refunded at the conclusion of the litigation.

Alternatively, if the Court does not preliminarily enjoin collection of taxes and fees, it should at least order the defendants to place the funds collected henceforth in escrow, to be returned to the taxpayers with accrued interest if plaintiffs are ultimately successful. Such alternative preliminary relief would remove any uncertainty regarding the return of monies paid, which itself is a substantial deterrent to operations in Nebraska by plaintiffs and other out-of-state carriers. Courts in similar cases have provided this kind of relief in order to minimize interference with the enforcement of contested taxes while at the same time protecting and ensuring the court's ability to provide relief in the most efficient, economical and expeditious manner.

STATEMENT OF FACTS

The Complaint in this case, filed on December 17, 1984, seeks declaratory, injunctive, and other relief against Nebraska's retaliatory tax on motor carriers whose vehicles are registered in certain other states. These taxes are imposed pursuant to Neb. Rev. Stat. §§60-305.02 and 60-305.03. Section 60-305.02 reads as follows:

> Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska, entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks, truck-tractors, semitrailers, trailers, or buses, and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks, truck-tractors, semitrailers, trailers, or buses, owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, in which such truck, truck-tractors, semitrailers, trailers, or buses are domiciled, grant reciprocity comparable to that extended by the laws of Nebraska.

Section 60-305.03 reads as follows:

> In case a foreign state or territory is not reciprocal as to license fees on commercial trucks, truck-tractors, semitrailers, trailers, or buses, the owners of such nonresident vehicles from those state or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks, truck-tractors, semitrailers, trailers, or buses, other than license fees, and the reciprocity law of any other foreign state or territory does not act to exempt Nebraska trucks, truck-tractors, semitrailers, trailers, or buses shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks, truck-tractors, semitrailers, trailers, or buses; . . .

These sections authorize the Nebraska Department of Motor Vehicles to monitor taxes and fees imposed by other states on Nebraska-registered vehicles and to implement retaliatory taxes and fees against motor carriers from other states which impose taxes and fees on Nebraska-based trucks.

The Department of Motor Vehicles has implemented Sections 60-305.02 and 60-305.03 by instituting retaliatory taxes and fees against carriers whose vehicles are registered in nine states.[1] Six of these are mileage-based taxes, ranging from $.01 per mile to $.04 per mile, which must be paid quarterly. The other three are flat annual fees from $12 to $175. See Attachment A.

The important feature of Nebraska's retaliatory taxes and fees for purposes of this case is that they are not imposed on vehicles registered in Nebraska.

[1] These states are: Arkansas, Arizona, Pennsylvania, New York, Ohio, Idaho, Nevada, Oregon and Wyoming.

Payments of the retaliatory tax are presently being made by many carriers, and will continue to be made periodically while this litigation is pending. The annual fees must be paid on or before January 1 by carriers from states against which Nebraska retaliates. The mileage-based fees must be paid after each quarter. Any carrier which has not paid the retaliatory fees is forbidden to use Nebraska roads. Neb. Rev. Stat. §60-305.03.

The retaliatory taxes and fees imposed under Sections 60-305.02 and 60-305.03 are collected by the Department of Roads, acting as agent for the Department of Motor Vehicles. Unless this motion is granted, the proceeds of the retaliatory taxes and fees collected by the Department shall be turned over to the State Treasurer for deposit in the Highway Cash Fund, where they will be expended for the repair and maintenance of the roads. Neb. Rev. Stat. §60-305.03(1).

ARGUMENT

I. THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION AGAINST COLLECTION AND ENFORCEMENT OF THE CHALLENGED FEES AND TAXES

In determining whether to grant a preliminary injunction, courts in this State, as elsewhere, consider whether plaintiffs have shown at least a substantial possibility of success on the merits; whether plaintiffs will suffer irreparable injury if the preliminary injunction is not granted, and whether such injury outweighs any harm that granting the injunction would inflict on the defendants. See Neb. Rev. Stat. §25-1063. *Ct. Virginia Petroleum Jobbers, Inc. v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). Consideration of those factors in this case fully warrants the preliminary relief requested by plaintiffs.

1. Plaintiffs Are Likely To Succeed On The Merits.

The retaliatory fees and taxes challenged in this case constitute a blatant and egregious violation of the Com-

merce Clause and the Privileges and Immunities Clause (Article IV, Section 2) of the United States Constitution. With respect to the Commerce Clause, although it is settled that states may require persons engaged in interstate commerce to pay their fair share of state taxes, the United States Supreme Court has established four requirements that such taxes must satisfy to be upheld under the Commerce Clause. Thus in *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981), the Court stated:

> [No] state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State.

See also, Complete Auto Transit v. Brady, 430 U.S. 274 (1977); *American Trucking Associations, Inc. v. Quinn*, 437 A. 2d 623 (Me. 1981).

Nebraska's retaliatory fees and taxes violate those principles in several respects. First, and most clearly, they discriminate on their face against interstate commerce. As described in the Statement, *supra*, they are imposed on motor carriers whose vehicles are registered in other states and operating in Nebraska, but not on carriers whose vehicles are registered in Nebraska. Accordingly, they contravene what the Supreme Court has described as "the fundamental principle that . . . [n]o State may, consistent with the Commerce Clause, 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977), quoting from *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959).[2]

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[2] In *Boston Stock Exchange v. State Tax Commission, supra*, the Court struck down a New York transfer tax on sales of securities which imposed a heavier tax on the sale if it occurred on an out-of-state stock exchange than if it occurred on a New York exchange. The Court explained that the fundamental Commerce Clause prohibition against discriminatory treatment of interstate commerce "flows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." 429 U.S. at 329, quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

Many cases have applied this principle to strike down discriminatory state taxes. In 1981, for example, the Supreme Court of Maine invalidated fees for certain highway use permits that were higher for vehicles registered in other states than for vehicles registered in Maine, and the Court rejected the State's argument that other fees and taxes imposed on locally-based carriers offset the discriminatory effect of the challenged fees. *American Trucking Associations, Inc v. Quinn, supra.*

Similarly, this year the Supreme Court of Indiana struck down an Indiana ad valorem property tax imposed solely on carriers operating in interstate commerce, and rejected that state's arguments that other property taxes paid by intrastate carriers cured the discrimination. *Private Truck Council of America, Inc. v. Huie*, ___ Ind. ___ , 466 N.E.2d 485 (Aug. 7, 1984). See also *Bacchus Imports, Ltd. v. Dias*, ___ U.S. ___ , 104 S.Ct. 3049 (June 29, 1984), in which the United States Supreme Court invalidated an Hawaiian tax on the sale of liquor because it exempted sales of certain liquors produced in Hawaii, thereby favoring local businesses over out-of-state businesses.

The retaliatory fees and taxes challenged in this case are no less discriminatory and violative of the fundamental purposes of the Commerce Clause than the taxes and fees struck down in the *Boston Stock Exchange, Bacchus Imports, American Trucking Associations* and *Private Truck Council of America* cases cited above. Under Sections 60-305.02 and 60-305.03, carriers like the plaintiff Dennis Trucking, whose tractor is registered in Ohio, must pay

a mileage fee of $.02 per mile to Nebraska in order to operate in the State. In contrast, competing carriers registered in Nebraska pay nothing. Indeed, Dennis Trucking and others like them are doubly disadvantaged because they must pay both the retaliatory tax to Nebraska and the tax to Ohio against which Nebraska is retaliating, whereas their Nebraska-based competitors, unless they happen to operate in Ohio, pay neither tax.

Furthermore, Nebraska's retaliatory fees and taxes clearly cannot be justified under the Commerce Clause by the existence of the fees and taxes of Ohio and the other states against which Nebraska is retaliating. Those fees and taxes are imposed on all carriers operating in those states without regard to their state of registration, including carriers registered in the state imposing them. Those charges, through perhaps onerous and objectionable to Nebraska, are non-discriminatory. Thus, Nebraska's retaliatory taxes are not compensating for any unfair or discriminatory taxes that other states are imposing solely on carriers based in Nebraska. Instead, they are simply additional taxes which are themselves plainly discriminatory because they are imposed only on carriers based in other states.

Nebraska's retaliatory fees and taxes also violate the Commerce Clause because they are not fairly related to the services provided to the taxpayers by the State—the fourth prong of the test stated in *Maryland v. Louisiana, supra*, and *Complete Auto Transit v. Brady, supra*. The purpose of Nebraska's retaliatory levies is not to compensate Nebraska for services it provides to carriers from Ohio or other retaliated-against states. Their only purpose is to impose a burden on carriers from certain specific states, which the legislature of Nebraska hopes will induce the legislatures of those states to repeal fees and taxes

that Nebraska finds objectionable.[3] Nor is the amount of the fees and taxes based on or measured by any benefit Nebraska provides to carriers from those states; the amount is measured instead simply by the amount of fees and taxes that other states impose on motor carriers operating in those states.

Indeed, because of their retaliatory nature and purpose, the taxes and fees challenged in this case are precisely the kind of measures the Federal Constitution was adopted to eliminate and prevent. In *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 82 (1920) the Supreme Court noted this fundamental purpose of the Constitution when it invalidated a New York income tax that discriminated against nonresidents. The Court rejected New York's argument that the other states could respond with similar measures; the Court stated:

> Nor can discrimination be corrected by retaliation; to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution.

Nebraska's discriminatory retaliatory taxes and fees violate not only the Commerce Clause but also the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution, which was designed to establish a "norm of comity" between states and to require each state to provide "substantial equality" of treatment to residents and non-residents. *Austin v. New Hampshire*, 420 U.S. 656 (1975).[4] Because they apply solely to carriers based in specified states and not to carriers based in Nebraska, the

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[3] But see *Austin v. New Hampshire*, 420 U.S. 656, 666-667 (1975) and discussion at pp.10-11, *infra*.

[4] The purposes and protections of the Privileges and Immunities Clause and the Commerce Clause are similar and frequently overlapping. See *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978), referring to the "mutually reinforcing relationship between the Privileges and Immunities Clause of Article IV and the Commerce Clause. . . ."

challenged taxes and fees clearly deny the former substantial equality of treatment with the latter. Indeed, in *Austin v. New Hampshire, supra*, the Supreme Court invoked the Privileges and Immunities Clause to invalidate an analogous New Hampshire tax that discriminated against Maine residents. Significantly for present purposes, the Court rejected New Hampshire's argument that its taxing scheme enabled the Maine legislature to cancel the discriminatory effect of the New Hampshire tax. The Court stated (420 U.S. at 666-667; emphasis supplied):

> [W]e do not think the possibility that Maine could shield its residents from New Hampshire's tax cures the constitutional defect of the discrimination in that tax. *In fact it compounds it. For New Hampshire in effect invites appellants to induce their representatives, if they can, to retaliate against it.*

Similarly, the ability of Ohio and other states to repeal their fees and taxes does not cure the constitutional defects of Nebraska's retaliatory fees and taxes.

By discriminating against motor carriers from certain states, Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 also violate Article III, Section 18 of the Constitution of the State of Nebraska, because they amount to a grant by the Legislature of special privileges and immunities to corporations and individuals operating motor vehicles registered in Nebraska. The statute amounts to a wholly arbitrary division of a natural class of persons (motor carriers), and is therefore impermissible under this State's Constitution. *United States Cold Storage Corp. v. Stolinski*, 168 Neb. 513, 526, 96 N.W.2d 408 (1959).

In sum, plaintiffs have shown a high probability of success on the merits of their claim that Nebraska's retaliatory fees and taxes are plainly discriminatory and unconstitutional levies, and they have thus amply satisfied the requirement that applicants for preliminary injunctive

relief show at least a "substantial possibility" of success on the merits.

2. Plaintiffs Will Suffer Irreparable Injury If The Court Does Not Grant The Preliminary Relief Requested.

In support of this motion plaintiffs have submitted the affidavit of Janis Dennis, who is in charge of vehicle registration and taxes for Dennis Trucking. Her affidavit shows that Dennis Trucking's operations are extremely sensitive to cost and that the retaliatory levy imposed by Nebraska on their Ohio-registered vehicle constitutes a substantial portion of the transportation cost of trips into Nebraska. In many cases the additional costs make prospective trips into Nebraska simply uneconomical or noncompetitive with transportation offered by Nebraska-based carriers. The result is that the retaliatory taxes and fees preclude plaintiffs as an economic matter from making as many trips into Nebraska as they made prior to their imposition or as they would make in their absence. This in turn results in unrecoverable losses of revenue. The same is undoubtedly true of other carriers from Ohio and the eight other retaliated-against states on whose behalf this class action suit was filed.

The injury that payment of these fees and taxes imposes on Dennis Trucking and similarly situated carriers is irreparable even if plaintiffs were clearly entitled to refunds of them at the conclusion of the litigation in the event the court upholds plaintiffs' constitutional claims. That is so because depriving them of the funds during the pendency of the litigation constitutes a significant drain on their cash flow and, in the motor carrier business, whether or not an operation will generate positive cash flow is often determinative of whether it can be undertaken. The result, as Ms. Dennis states in her affidavit, is:

> Whether or not we ultimately obtain a refund of Nebraska's retaliatory taxes at the end of the

> case, having to pay the money currently, when our Nebraska competitors do not, will as practical matter prevent us from operating in Nebraska as frequently as we otherwise would.

Dennis affidavit, ¶7.

3. The Injury To Plaintiffs If The Preliminary Injunction Is Not Granted Outweighs The Injury To The State If It Is Granted.

If a preliminary injunction is granted and the defendants ultimately prevail on the merits, they will be entitled then to collect whatever taxes that would otherwise have been payable during the litigation. In terms of balancing the injuries, therefore, the question is whether plaintiffs or the State is injured more by being deprived of the money during the pendency of the litigation. In view of the greatly superior revenue raising resources of the State, plaintiffs submit that their injury clearly outweighs that of the defendants.

Plaintiffs recognize that a preliminary injunction may result in some enforcement difficulties if the State defendants ultimately prevail. That consideration, however, should be weighed against two other considerations. The first is the high probability, reflected in the earlier discussion, that plaintiffs will succeed on the merits. The second pertinent consideration is that the challenged taxes and fees significantly deter carriers based in the retaliated-against states from operating in Nebraska. *See* the affidavit of Ms. Dennis. This very real impediment of the flow of interstate commerce deprives the citizens of Nebraska of the economic benefits of that commerce and deprives the government of Nebraska of whatever tax revenues those benefits may generate. These ripple effects are obviously impossible to qualify, but it is not unreasonable to conclude that they outweigh the short-term revenues Nebraska might obtain from its retaliatory fees and taxes. Certainly it was the premise of the Commerce Clause that

each state would benefit more from the absence of obstacles to commerce than from their existence.[5]

II. ALTERNATIVELY THE COURT SHOULD REQUIRE ALL FUNDS COLLECTED UNDER THE CHALLENGED FEES AND TAXES TO BE PLACED IN ESCROW

If the Court concludes that a preliminary injunction against collection would unduly interfere with the enforcement of Neb. Rev. Stat. §§60-305.02 and 60-305.03, it should at lest grant plaintiffs' alternative request for preliminary relief by requiring the defendants to place the funds collected henceforth in escrow, which would be disbursed to the taxpayers with accrued interest less costs of the litigation and reasonable attorneys' fees when and if plaintiffs ultimately prevail on the merits.

This alternative form of relief is one that other courts have typically provided in similar circumstances. See Order of Justice Alexander, dated January 29, 1981 in *American Trucking Associations v. Brennan*, Superior Court of Cumberland, Maine, Docket No. CV 81-907[6] (Attachment B) and Order of Judge Boles, dated January 3, 1983, in *Private Trucking Council of America, Inc. v. Huie*, Hendricks County (Indiana) Circuit Court (Attachment C). Although not as protective of plaintiffs' interests as a preliminary injunction against collection of the taxes, an escrow order provides several significant benefits.

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[5] A further consideration militating in favor of a preliminary injunction is that if plaintiffs are ultimately successful, as they are likely to be, an injunction will have saved the State the administrative costs involved in implementing and enforcing the statute and the costs of refunding the payments to perhaps thousands of carriers who paid the taxes and fees. Those costs are not insubstantial. In ordering refunds of the taxes found unconstitutional in *Private Truck Council of America, Inc.* v. *Huie, supra*, the court in that case found that the costs simply of cutting and mailing the 40,000 checks corresponding to tax payments over a two year period will be approximately $30,000.

[6] This is the case that was later affirmed on the merits *sub nom. American Trucking Associations, Inc. v. Quinn, supra.*

First, although plaintiffs believe that they will be entitled as a matter of state law and the Federal Constitution to the return of all unconstitutionally exacted taxes and fees, they will not be certain of that entitlement until the case is concluded, and this lack of certainly itself creates an obstacle to plaintiffs' interstate operations in Nebraska that would be lessened by establishment of an escrow found.

Moreover, an escrow fund would greatly facilitate refunds of at least the fees and taxes collected during the pendency of the case if the tax is ultimately held unconstitutional. An escrow will provide a ready fund from which refunds could easily be paid without having to go through administrative channels of the State.

Second, from the point of view of the State, requiring the funds to be set aside in escrow would not impede the collection of the taxes and fees and would thus threaten no loss of revenues. Nor would the State (or the plaintiffs) lose the time value of money if, as plaintiffs propose, the escrowed funds are required to be invested at commercially reasonable rates. Indeed, plaintiffs submit that granting the preliminary relief requested would serve the interests of the State as much as the plaintiffs. It will allow the State to plan and budget its expenditures and revenues more accurately and avoid the dislocations and strains inevitably created by a large unfunded liability.

As noted, these considerations have led two other courts recently to require contested tax collections to be placed in escrow, and they would support the same relief here.

CONCLUSION

The Court should issue a preliminary injunction against collection of the fees and taxes imposed under Neb. Rev. Stat. §§60-305.02 and 60-305.03, or alternatively issue an order requiring that the fees and taxes collected be placed in an escrow fund.

Respectfully submitted,

/s/ Richard A. Allen

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ATTACHMENT A

1984 RECIPROCITY MANUAL

INTERSTATE REGISTRATION SECTION

DEPARTMENT OF MOTOR VEHICLES

Nebraska is currently a member of the following apportioned registration agreements:

INTERNATIONAL REGISTRATION PLAN

Alabama	Iowa	Mississippi	Oregon	Utah
Alberta	Illinois	Missouri	Oklahoma	Virginia
Arizona	Kansas	Montana	Pennsylvania	Wisconsin
Arkansas	Kentucky	Nebraska	South Dakota	Wyoming
Colorado	Louisiana	North Dakota	Tennessee	
Idaho	Minnesota	North Carolina	Texas	

UNIFORM PRORATE AND RECIPROCITY AGREEMENT

Alaska	California	New Mexico
British Columbia	Nevada	Washington

Any carrier engaged in operating a fleet of one of more apportionable vehicles in the State of Nebraska may, in lieu of full county registration, license such a fleet under the apportioned registration laws of the State of Nebraska.

An apportionable vehicle shall mean any vehicle except recreational vehicles, vehicles displaying restricted plates, city pick up and delivery vehicles, buses used in transportation of chartered parties, and government owned vehicles, used in two or more jurisdictions that allocate or proportionally register vehicles and is used for the transportation of persons, for hire, or designed, used or maintained primarily for the transportation of property and:

1. is a power unit having a gross weight in excess of 26,000 pounds,

2. is a power unit having three or more axles (on the ground), regardless of weight, or
3. is used in combinations when weight of such combination exceeds 26,000 pounds gross vehicle weight.

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Alabama			$10	80000	none	CGW	9/30	11/16	9/30	11/16	no[1]	yes
Alaska			$10	95000	none	unladen	12/31	6/1	monthly	none	no	yes
Arizona		[4]	$10ST $20CU[2]	80000	none	CGW	12/31	3/1	monthly	none	no	no
Arkansas			$25[1]	80000[2]	1000	CGW	6/30	8/1	monthly	none	no	no
California			$45	80000	none	unladen	12/31	3/1	monthly	none	yes	no
Colorado		$10[1]	$25	80000	none	unladen	12/31	3/1	12/31	3/1	no	no
Connecticut	X			80000	2% lic. wt.	CGW	4/30	5/1	monthly	none	no	yes

Delaware	X			80000	none	CGW	Stag	Stag			no	yes
Dt of Columbia	X			79000	none	CGW	3/31	4/1	3/31	4/1	no	yes
Florida	X			80000	none	CGW	Stag	Stag	Stag	none	no	yes
Georgia	X			80000	none	CGW	12/31	4/2	12/31	4/2	no	yes
Hawaii	X			80800	none	net load	12/31	4/1	12/31	4/1	no	no
Idaho			$5 + .03 /mile	80000	none	CGW	12/31	3/1	monthly	none	no	no
Illinois			$10	80000	none	CGW	12/31	3/1	12/31	[1]	no	no
Indiana	X			80000	none	CGW	2/28	3/1	monthly	none	no	yes
Iowa			$10	80000	*	CGW	12/31	3/15	12/31	3/16	no	no
Kansas			$20	80000	none	CGW	12/31	3/1	[1]	[2]	yes	no
Kentucky			$25	80000	none	CGW	3/31	4/1	monthly	none	no	no
Louisiana			$25	80000	5% lic. wt.	CGW	3/31	4/1	monthly	none	no	yes
Maine	X			80000	**	CGW	12/31	3/1	monthly	none	no	yes
Maryland	X			80000	none	CGW	4/30	5/1	3/31	4/1	no	yes
Massachusetts				80000	none	CGW	12/31	1/1	monthly	none	no	yes

* 5% on non-agricultural, 25% on agricultural
** 10% less than 15,000; 5% greater than 15,000

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Michigan	X			80000	none	CGW	2/28	3/1	3/31	4/1	no	yes
Minnesota			$10	80000	none	CGW	12/31	3/2	monthly	none	no	no
Mississippi	ADD MS as Recip. See X4-13 on Farm Plated Vehicles		$10	80000	none[1]	CGW	10/31	11/1	monthly	[3]	no	yes
Missouri			$10	80000	none	CGW	12/31	3/1	monthly	none	no	yes
Montana			$10 ST $15 CU	80000	none	CGW	12/31	2/16	monthly	none	no	yes
Nevada			$10 + mileage $.02 ST $.04 CU	80000	none	unladen	12/31	2/1	monthly	none	no	no

New Hampshire	X			80000	5% lic. wt.	CGW	3/31	4/1	monthly	none	no	yes
New Jersey	X			80000	none	CGW	3/31	4/1	monthly	none	no	yes
New Mexico			$15 ST $25 CU	86400	none	CGW	12/31	3/3	12/31	3/3	no	no
New York	X [1]	$5 ST 10 CU + mile [2]	$5 ST $10 CU + mile [3]	80000	none	CGW	Stag	Stag	monthly	none	no[1]	no
North Carolina			$15	80000	5%	CGW	12/31	2/16	12/31	2/16	yes	no
North Dakota			$20	80000	none	CGW	12/31	2/2	3/31	5/1	no	yes
Ohio	X [1]	$.01 ST $.02CU [3]	$.01 ST $.02 CU [4]	80000	none	CGW	12/31	3/2	monthly	none	no[1]	no
Oklahoma			$12	80000	none	CGW	12/31	3/2	monthly	none	no	yes
Oregon			$10 + mile[5]	80000	none	gross wt	12/31	3/15	monthly	none	no	yes
Pennsylvania			$15[6]	80000	•	CGW	5/31	6/1	3/31	4/1	no	yes
Rhode Island	X			80000	none	CGW	3/31	4/1	3/31	4/1	no	yes

• 3% on state highways; none on interstate system

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
South Carolina	X			80000	none	net load	11/15	12/1	monthly	none	yes	yes
South Dakota			$15 ST $25 CU	80000	5%	CGW	12/31	4/1	3/31	4/1	no	no
Tennessee			$20	80000	none	CGW	3/31	4/15	monthly	none	no	no
Texas			$25	80000	none	CGW	3/31	4/1	monthly	none	yes	yes
Utah	[1]		$10 ST $15 CU	80000	none	CGW	12/31	3/1	monthly	none	no	no
Vermont	X			80000	none	CGW	4/40	5/1	2/28	3/1	no	yes

Virginia			$15	80000	5% lic.wt.	CGW	2/28	4/1	monthly	none	no	yes
Washington			$15 ST $25 CU	80000	none	CGW	12/31	3/1	monthly	none	no	yes
West Virginia	X			80000	5% lic.wt.	CGW	6/30	7/1	monthly	none	no	yes
Wisconsin			$10	80000	none	CGW	12/31	3/1	monthly	none	no	no
Wyoming			$10 + mileage .015 ST .030 CU	80000	none	unladen	12/31	3/1	12/31	3/1	yes	no
Alberta			$10	80000[1]	10000	CGW	3/31	5/1	3/31	4/30	no	yes
British Columbia			$10	80000	none	CGW	2/28	3/1	2/28	3/1	no	no
Manitoba	X			80000	none	CGW	2/28	3/1	2/28	3/1	no	yes
New Brunswick		$10	$10	80000	none	CGW	12/31	4/1	12/31	4/1	no	no
New Foundland		$10	$10	73280	none	CGW	3/31	5/1	3/31	4/1	no	no
Nova Scotia	X			80000	none	CGW	2/28	3/1	12/31	4/1	no	yes
Ontario	X			80000	none	CGW	12/31	4/1	12/31	2/28	no	yes
Prince Ed Isld		$10	$10	74000	none	CGW	3/31	4/1	3/31	[4]	no	no

	COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Mexico	X [2]												
Saskatchewan			$10 + .05/ mile	$10 + mileage [7]	74000	none	CGW	4/30	5/1	4/30	5/1	no	no
Quebec			$10	$10	80000	none	CGW	2/28	3/1	2/28	3/1	no	no
		Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity

CHART EXPLANATIONS

COLUMN I.

Vehicles properly registered in these jurisdictions shall be granted full license reciprocity on interstate operations provided the vehicle is properly registered. Properly registered shall mean a vehicle licensed or registered in one of the following:

- The jurisdiction where the person registering the vehicle has his/her legal residence, or
- The jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled, and the vehicle is assigned to such principal place of business, or
- The jurisdiction where, because of an agreement or arrangement between two or more jurisdictions, or pursuant to a declaration, the person registering the commercial vehicle has licensed the vehicle as required by said jurisdiction.

Any vehicle not properly registered as defined above shall be subject to purchasing a Trip Permit based upon the jurisdiction determined as the "principal place of business".

EXCEPTIONS:

1. Vehicles properly registered in *New York* and *Ohio* shall be required to purchase a Trip Permit and/or Mileage Permit. *New York* household goods carriers are exempt from Trip Permit and Mileage Permit fees up to 71,000 pounds.
2. *Mexico* - Vehicles properly registered in Mexico and used for private use will be given full license reciprocity

on interstate movement. However, if the vehicle is being used commercially, the owner will be required to purchase a Nebraska Non-Resident Commercial Registration from the County Treasurer.

COLUMN II.

The Trip Permit fees are indicated for each jurisdiction and the permit is valid for 72 hours or for a single trip into the state. *The Trip Permit does not allow intrastate movement.* For purposes of the chart:

CU = Combinations of tractor semitrailers
ST = Straight trucks pulling any type of trailer

1. *Colorado* - Any non-apportioned power unit or combination of vehicles grossing 10,000 pounds or more but not exceeding 26,000 pounds will be required to purchase a Trip Permit for $10.

2. *New York* - Straight Trucks..... $ 5.00
   Tractor Trailer Combination..... $10.00
   Plus: 18,001-28,000 ..... $.010 per mile
   28,001-38,000 ..... .015 per mile
   38,001-48,000 ..... .020 per mile
   48,001-58,000 ..... .025 per mile
   58,001-68,000 ..... .030 per mile
   68,001-78,000 ..... .035 per mile

3. *Ohio* - Straight Trucks..... $.01 per mile
   Tractor Trailer Combination..... $.02 per mile

4. *Arizona* - A non-apportioned Arizona vehicle having a combined gross weight of 12,000-26,000 pounds will be required to purchase an Arizona Motor Carrier Trip Permit at the following rates for each trip:

   $12 - Up to 50 miles
   $48 - More than 50 miles

COLUMN III.

The Trip Permit fees are indicated for each jurisdiction and the permit is valid for 72 hours or for a single trip into the state. *The Trip Permit does not allow intrastate movement.* For purposes of the chart:

CU = Combinations of tractor semitrailers
ST = Straight trucks pulling any type of trailer

1. *Arkansas* - Maximum weight of Arkansas based vehicles allowed in Nebraska is 73,280 pounds without a Reciprocity Permit. These permits allow the vehicle to carry 80,000 pounds at an annual fee of $175 per vehicle and applies to both apportioned and non-apportioned vehicles. In lieu of the Reciprocity Permit, a mileage fee of $.05 per mile travelled in Nebraska may be purchased.

2. *Arizona* - A non-apportioned Arizona vehicle having a combined gross weight of more than 26,000 pounds will be required to purchase a Trip Permit *plus* an Arizona Motor Carrier Trip Permit at the following rates for each trip:

   $12 - Up to 50 miles
   $48 - More than 50 miles

   New York - Straight Trucks..... $ 5.00
   Tractor Trailer Combination..... $10.00
   Plus: 18,001-28,000..... $.010 per mile
   28,001-38,000..... .015 per mile
   38,001-48,000..... .020 per mile
   48,001-58,000..... .025 per mile
   58,001-68,000..... .030 per mile
   68,001-80,000..... .035 per mile

4. *Ohio* - Straight Trucks..... $.01 per mile
   Tractor Trailer Combination..... $.02 per mile

5. *Oregon* - 26,001-38,000 ..... $.03 per mile
   38,001-52,000 ..... $.04 per mile
   52,001-80,000 ..... $.05 per mile
6. *Pennsylvania* - Apportioned and non-apportioned vehicles based in Pennsylvania grossing in excess of 26,000 are required to pay a Reciprocity Permit fee of $36 per axle for travel into and thru Nebraska. In lieu of the Reciprocity Permit, a fee of $15 will be assessed for each trip into Nebraska. Non-apportioned vehicles will be required to purchase a $15 Trip Permit in addition to the Reciprocity Permit.
7. *Saskatchewan* - 26,001-50,000 ..... $.10 per mile
   50,001-74,000 ..... $.15 per mile

COLUMN IV.

1. *Alberta* - Metric Conversion for 1 Kilogram = 2.2046 pounds.
2. *Arkansas* - Maximum weight of Arkansas based vehicles allowed in Nebraska is 73,280 without a Reciprocity Permit. These permits allow the vehicle to carry 80,000 pounds at an annual fee of $175 per vehicle and applies to both apportioned and non-apportioned vehicles.

COLUMN V.

1. *Mississippi* - No tolerance (except 2,000 pounds tolerance on liquified compressed gas).

COLUMN IX.

1. *Kansas* - December 31 is the passenger vehicle expiration date *except* for staggered registrations which expire the last day of expiration month.

COLUMN X.

1. *Illinois* - Changes each year but not beyond March 1.
2. *Kansas* - Staggered registrations with no extensions.
   Others - February 16 with March 1 enforcement date.

3. *Mississippi* - Enforcement date of the 16th of the month following the month of expiration.
4. *Prince Edward Island* - Discretion of the Minister with a maximum of 30 days.

COLUMN XI.

1. *Alabama, New York, and Ohio* - These residents attending an accredited school in Nebraska will *not* be required to obtain a Nebraska plate and registration while in attendance at that institution.

DEPARTMENT OF MOTOR VEHICLES
STATE OF NEBRASKA
LINCOLN 68509
(402) 471-2281

MEMORANDUM

TO: All Carrier Enforcement Officers
FROM: Interstate Registration Section
DATE: October 27, 1982
SUBJECT: Arizona Motor Carrier Permit

Effective November 1, 1982, Nebraska will begin charging Arizona based vehicles a Motor Carrier Permit comparable to the permit fee being charged to Nebraska based vehicles operating in Arizona.

The permit fee is to be charged on all vehicles having a combined gross weight of more than 12,000 pounds, including apportioned carriers.

An apportioned vehicle having a combined gross weight of 12,000 pounds or more will be required to purchase an Arizona Motor Carrier Permit only. A non-apportioned vehicle having a combined gross weight of 12,000 to 26,000 pounds will be required to purchase an Arizona Motor Carrier Permit only. A non-apportioned vehicle having a combined gross weight of more than 26,000 pounds will be required to purchase a Prorate Trip Permit *plus* an Arizona Motor Carrier Permit.

MOTOR CARRIER PERMIT FEES:
$12 for up to 50 miles operated on Nebraska Highways
$48 for more than 50 miles operated on Nebraska Highways

Effective January 1, 1983, carriers not obtaining the Motor Carrier Permit should be cited for violation of Nebraska Statute 60-305.02.

If you have any questions, please feel free to call me at 402-471-3891.

ARKANSAS

TRUCKS AND BUSES

An Arkansas licensed vehicle (prorated or non-prorated) licensed or grossing in excess of *73,280 pounds* not displaying reciprocity decal from Nebraska on side of vehicle must purchase a 5¢ a mile trip permit. *This is in addition to the 72 hour $25.00 prorate permit if vehicle is not prorated with Nebraska.*

A vehicle regardless of State of license, leased to an operator from Arkansas, that has a vehicle or combination of vehicles, that grosses in excess of 26,000 pounds empty or loaded, or any power unit with three (3) axles or more regardless of weight, if not prorated with Nebraska, must purchase a 72 hour $25.00 prorate permit.

FARM PLATES

Note: Farm plated truck tractors shall be treated the same as commercial licensed vehicles for trip permit purpose.

SEE ATTACHMENTS

PENNSYLVANIA

TRUCKS AND BUSES

A *Pennsylvania licensed vehicle* (prorated or non-prorated) licensed or grossing in excess of 26,000 pounds not displaying reciprocity decal from Nebraska on side of vehicle must purchase a $15.00 trip permit. *This is in addition to a $15.00 72 hour prorate permit if vehicle is not prorated with Nebraska.*

A vehicle regardless of State of license, leased to an operator from Pennsylvania that has a vehicle having three (3) axles or more on the power unit or grossing in excess of 26,000 pounds, empty or loaded, must prorate with Nebraska or purchase a 72 hour $15.00 prorate permit.

NOTE - FARM PLATE

Farm plated Pennsylvania trucks and farm plated truck-tractor combinations do not need prorate or reciprocity permits of any kind.

SEE ATTACHMENT

NEBRASKA RECIPROCITY QUALIFICATIONS

YEAR 19____

PENNSYLVANIA: Complete Sections A & B

Nebraska requires the payment of a $36 per axle fee on Pennsylvania plated vehicles having a combined gross weight or registered combined gross weight in excess of 26,000 pounds, used on Nebraska highways and which are required to be registered for operation in Nebraska.

Carriers using truck tractors and combinations need to anticipate the number of axles that will be used in combination during the year. For the purpose of this tax, the front wheels on any vehicle are considered to be an axle.

ARKANSAS: Complete Sections A & C

Nebraska requires the payment of an annual $175 fee on Arkansas plated vehicles having a combined gross weight or registered combined gross weight in excess of 73,280 pounds used on Nebraska highways.

SECTION A

Name		IRP Account #	
Address	City	State	Zip Code

SECTION B

Indicate number of stickers required in each category.

Number of Vehicles	Number of Axles By Category	Amount Due By Category	STATE OFFICE USE ONLY
2 axles____	x 2 ____	x $36 = $____	2 axles____
3 axles____	x 3 ____	x $36 = $____	3 axles____
4 axles____	x 4 ____	x $36 = $____	4 axles____
5 axles____	x 5 ____	x $36 = $____	5 axles____
6 axles____	x 6 ____	x $36 = $____	6 axles____
	Total Axles	Total Due	Date____ Check No.____ Cash____ Check No. 2____

SECTION C

____ x $175 = $____

Number of Stickers — Total Fees Due

ALL CHECKS NEED TO BE CERTIFIED. Return to:
Department of Motor Vehicles
Interstate Registration Section
P. O. Box 94789
Lincoln, NE 68509

STATE OFFICE USE ONLY
Sticker #s____
Date____
Check No.____ Cash____
Check No. 2____

OMV-03-5(
11-83

ATTACHMENT B

STATE OF MAINE
CUMBERLAND,

ss.

SUPERIOR COURT

CIVIL ACTION

Docket No. CV 81-907

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Plaintiffs

v.

JOSEPH E. BRENNAN, *et al.*,
Defendants

ORDER

To implement the Opinion and Order of this Court dated July 29, 1981, the Court hereby orders as follows:

1. Pursuant to this Court's Opinion and Order of July 29, 1981, the parties shall establish an escrow fund (hereinafter "escrow fund") at the Canal Bank, located at One Central Plaza, Augusta, Maine.

2. All defendants, with the exception of defendant Joseph E. Brennan, and all agents or other persons acting under such defendants' direction, supervision, or control, are hereby ordered to deposit into the escrow fund established pursuant to this Order all monies collected or received pursuant to 29 M.R.S.A. §246-A from owners or operators of trucks which are not registered in the State of Maine. At all times such funds will be handled in a manner which allows them to be identified as escrow fund

monies and shall not become a part of the State Treasury for purposes of the doctrine of sovereign immunity. In collecting, receiving or otherwise dealing with such monies, all defendants, and all agents or other persons acting under such defendants' direction, supervision, or control, shall be deemed to be acting pursuant to this Order. The express purpose of this provision of the Order is to eliminate any bar to recovery of such monies by individual motor carriers which might otherwise arise from the doctrine of sovereign immunity.

3. Defendant Secretary of State shall prepare weekly reports which shall include total gross receipts received and deposited in the escrow fund established pursuant to this Order and send such reports to plaintiff American Trucking Associations, Inc. (c/o Douglas A. Hughes, Director, State Laws, Taxation and Reciprocity, 1616 P Street, N.W., Washington DC 20036) with copies to plaintiffs' counsel (John C. Lightbody, Esquire, Murray, Plumb & Murray, 30 Exchange Street, Portland, ME 04101). Such weekly reports shall identify those gross amounts which were received as Forty Dollar ($40.00) annual permit fees and those gross amounts which were received as Twenty Dollar ($20.00) "15-day trip permit" fees.

4. Defendant Secretary of State shall maintain adequate records which identify, by name, address, and dates and amounts of monies paid, all persons from whom monies are received or collected for deposit in the escrow fund. Such records shall be made available to plaintiffs upon reasonable notice.

5. The defendants shall have the Canal Bank prepare a report on the first working day of each week, which report shall include the following: (1) the total amount of all deposits made to the fund to date; (2) the amount of all deposits made to the fund in the preceding week; (3) a description, including dollar amounts, of all current investments; (4) a monthly running total of the income earned

to date. Such reports shall be submitted to this Court with copies to plaintiff American Trucking Associations, Inc. (c/o Douglas A. Hughes, Director, State Laws, Taxation and Reciprocity, 1616 P Street, N.W., Washington, DC 20036), plaintiffs' counsel, and defendants' counsel (William C. Nugent, Assistant Attorney General, State House, Augusta ME 04333).

6. The Canal Bank shall at all times maintain accurate records and invest deposited funds and accrued earned income at commercially reasonable rates in a commercially reasonable and prudent manner.

7. If an order is entered by this Court permanently enjoining the defendants from enforcing 29 M.R.S.A. §246-A against plaintiffs, defendant Secretary of State shall, unless said order is stayed, within thirty (30) days of the permanent injunction, provide Canal Bank with the records maintained pursuant to paragraph 4 above identifying, by name, address, and dates and amounts of monies paid, all persons from whom monies have been collected or received for deposit in the escrow fund. Within a reasonable time after receipt of those identification records, the Canal Bank shall reimburse persons entitled to such funds by mailing checks to the individual motor carriers.

8. The manner in which the income generated by the escrow fund is disposed of in the event plaintiffs prevail in this action is specifically reserved for the trial on the merits. In any event, Canal Bank shall be compensated out of accrued earned income for all reasonable and customary costs, fees, and charges in connection with establishing and administering the escrow fund, including if plaintiffs should prevail, costs incurred in disbursing monies to individual motor carriers.

9. Whether plaintiffs may recover from defendants their costs, including the charges of Canal Bank described in paragraph 8 above, and/or counsel fees incurred in this action is specifically reserved for trial on the merits.

SO ORDERED.

Dated: July 31, 1981.

/s/
Justice, Superior Court

A True Copy.

Attest: /s/ Margaret P. LaSassey
Clerk of Courts

JUL 31 1981

ATTACHMENT C

STATE OF INDIANA

COUNTY OF HENDRICKS

SS:

IN THE HENDRICKS CIRCUIT COURT

CAUSE NO. CV 882-361

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*,
Plaintiffs,

vs.

JOHN HUIE, *et al.*,
Defendants.

ORDER FOR ESCROW OF FUNDS

Come now the plaintiffs, by counsel, and file their "Motion for Preliminary Injunction Against Disbursement of Funds and for Establishment of Escrow" which reads as follows:

(H.I.)

And come now the defendants, by counsel, and file their "Defendants' Concurrance to Plaintiffs' Motion . . . " which reads as follows:

(H.I.)

And the Court being duly advised finds as follows:

1. That the collections from the indefinite-situs distributable property tax, levied by Acts 1981, P.L. 66, are due to be paid to the Indiana Department of State Revenue on December 31, 1982.

2. That pursuant to IC 6-1.1-8-35(d) a majority of the tax collections are to be distributed to the various counties.

3. That no procedure exists for taxpayers to seek refunds of erroneously collected taxes from the various counties.

4. That if any portion of the indefinite-situs distributable property tax is determined to have been collected erroneously then the Indiana Department of State Revenue would be the proper party in interest to refund the erroneous collections.

5. That placing the tax collections in controversy into escrow is in the best interest of all parties.

6. That pursuant to IC 6-1.1-8-35.1 necessary funds are to be appropriated from the tax collections to pay the administrative expenses of collecting and administering the tax.

7. That these expenses are necessary to facilitate the collection and administration of the tax.

8. That the Treasurer of the State of Indiana is the proper party to act as escrow agent for these tax collections.

It is, therefore, ORDERED that the Indiana Department of State Revenue transfer all collections from the assessment and collection of the indefinite-situs disbributable property tax, Acts 1981, P. L. 66, to the Treasurer of the State of Indiana which are in excess of the appropriation for administrative expenses. The Treasurer, Honorable Julian L. Ridden, shall deposit the funds in an escrow account, segregated from the other funds of the State of Indiana. The funds placed in escrow shall be deposited in interest bearing accounts or invested in interest bearing securities, as permitted by law. All interest payments shall also be held in escrow.

These funds shall be held in escrow until further order of this Court.

Dated: _____ _____
Judge, Hendricks Circuit Court

Copies to:

Dan S. LaRue
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

Attorney for Defendants

Jacob P. Billig, Esq.
BILLIG, SHER & JONES, P.C.
2033 K. Street, N.W.
Washington, D.C. 20006

Melvin R. Daniel, Esq.
DANN, PECAR, NEWMAN, TALESNICK & KLEIMAN
1600 Market Square Center
151 N. Delaware Street
Indianapolis, Indiana 46204

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF DOUGLAS COUNTY
STATE OF NEBRASKA

Doc. 841 No. 154

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*

On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

STATE OF NEBRASKA, *et al.*,

Defendants.

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

DEC 27 1984

RUDY J. TESAR
CLERK DISTRICT COURT

AFFIDAVIT OF JANIS DENNIS

STATE OF OHIO
COUNTY OF LORAIN

SS

Janis Dennis, being duly sworn, deposes and states as follows:

1. My name is Janis Dennis. My address is 23821 Royalton Road, Columbia Station, Ohio 44028. I work with my husband, Mark Dennis, in our business as a motor carrier of goods in interstate commerce. In addition to driving our vehicles, I am responsible for the administrative aspects of the business, including registration, licensing, taxes and fees for our vehicle. I am submitting this

affidavit in support of Plaintiffs' Motion For Preliminary Injunction or in the Alternative To Require Placement Of Tax Collections in Escrow.

2. In 1978, my husband and I purchased a truck and we began our own trucking business, Dennis Trucking. We now operate one tractor and two trailers in several states, including the State of Nebraska. Our tractor is registered in Ohio, and is therefore subject to the retaliatory tax imposed by Nebraska. We have paid to Nebraska retaliatory taxes of $9.00 on November 17, 1984; $9.60 on December 9, 1983; $9.00 on December 4, 1983; $9.00 on November 2, 1983; $7.00 on September 13, 1983; and $9.00 on June 1, 1983.

3. As a result of Nebraska's retaliatory tax, we operate in Nebraska less often than we otherwise would. Nebraska's tax makes it particularly difficult to operate profitably in the State because it places us at a distinct disadvantage with respect to our Nebraska-based competitors. As a result of Nebraska's tax, we are subject to a double tax burden because our Ohio-based truck is subject both to Ohio's mileage tax, which is imposed on both resident and nonresident carriers, and to Nebraska's retaliatory tax. In contrast, Nebraska-registered vehicles which operate on the same routes as we do are not subject to the Nebraska tax. We have lost business in Nebraska because of the added cost of the retaliatory tax, which has made certain loads unprofitable which we otherwise could have taken.

4. The economic hardship of Nebraska's retaliatory tax is magnified on small carriers such as ourselves. In trying to build our business, we have incurred a substantial capital cost in purchasing a truck, a cost which is very difficult for a small-volume carrier like us to absorb. In addition, we incur substantial daily operating costs, including fuel, maintenance, and federal and state taxes and fees. The latter constitute a substantial portion of our operating costs.

5. Because of our high capital and operating costs, the line between profitable and unprofitable operations is often very closely drawn. The smallest added expense can often make the difference between the two. Thus, Nebraska's retaliatory tax has a significant financial impact on our business and we simply operate less often in the State because of the tax.

6. Another substantial burden of the retaliatory tax is the time, and therefore business opportunities, lost in paying the retaliatory tax and obtaining the permits. Permits must be purchased at one of three offices located along the main highways of the State. The process of stopping and parking the truck, giving the appropriate information and obtaining the permit, and getting back on the road generally takes from one half to one hour. However, not infrequently the office is particularly crowded or temporarily closed, and we have had to wait for several hours or even overnight to obtain a permit. This time, of course, would otherwise have been spent on the road carrying a load. In the trucking business, time is literally money, and thus the time spent obtaining Nebraska's retaliatory permit means lost profits for our business.

7. The immediate substantial costs and burdens of the retaliatory tax cannot be fully remedied by obtaining refunds at the end of the suit even if we succeed in having the tax declared unconstitutional. Our immediate problem is one of cash flow—if a load will not produce a present profit, we mut in essence advance the extra costs of haulage, which deprives us of the use of that money for a substantial period of time. For a small carrier such as Dennis Trucking, that is not economically feasible. Thus, whether or not we ultimately obtain a refund of Nebraska's retaliatory taxes at the end of the case, having to pay the money currently, when our Nebraska competitors do not, will as a practical matter prevent us from operating in Nebraska as frequently as we otherwise would.

This, of course, results in substantial loss of revenue that can never be recovered.

/s/ Janis Dennis
Janis Dennis

Subscribed and sworn to before me this 21st day of December, 1984.

/s/ Linda K. Kijek
Notary Public

My Commission Expires:
LINDA K. KIJEK
Notary Public for the State of Ohio
My Commission Expires on

IN THE DISTRICT COURT OF LANCASTER COUNTY
STATE OF NEBRASKA

Docket 390 Page 26

MARK E. DENNIS, doing business as Dennis Trucking,

Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

STATE OF NEBRASKA,

and

HOLLY JENSEN, Individually and as Director, Nebraska Department of Motor Vehicles,

and

LOU LAMBERTY, Individually and as Director, Nebraska Department of Roads,

and

KAY ORR, Individually and as Nebraska State Treasurer,

Defendants.

FIRST AMENDED PETITION

1. This is an action for a declaratory judgment pursuant to Neb. Rev. Stat. §25-21,149 *et seq.* to declare retaliatory taxes imposed by Neb. Rev. Stat. §§60-305.02 and 60-305.03 unconstitutional, and to enjoin the defendants from enforcing and collecting the tax, and to obtain refunds of all taxes unlawfully exacted.

PARTIES

2. Plaintiff Mark E. Dennis owns and operates Dennis Trucking, a sole proprietorship with its principal place of

business in Ohio. He is an owner of a nonresident vehicle for purposes of the taxes and fees imposed under Sections 60-305.02 and 60-305.03, which vehicle is duly authorized to operate in the State of Nebraska.

3. The defendants are the State of Nebraska and various individual State officials responsible for the implementation, collection, and administration of the retaliatory taxes and fees at issue in this case. Defendant Holly Jensen is the Director of Motor Vehicles. The Department of Motor Vehicles is the State agency which has authority, pursuant to Neb. Rev. Stat. §§60-305.02 and 60-305.03, to implement the retaliatory taxes and fees authorized in those sections. The Department of Motor Vehicles is also the State agency which assesses and enforces those retaliatory taxes and fees.

4. Defendant Lou Lamberty is the Director of the Department of Roads. The Department of Roads is the State agency which has authority, pursuant to Neb. Rev. Stat. §60-305.03(1), to act as agent for the Department of Motor Vehicles in collecting the retaliatory taxes and fees being challenged in this case.

5. Defendant Kay Orr is the State Treasurer of Nebraska. The State Treasurer is directed, pursuant to Neb. Rev. Stat. §60-305.03, to place the proceeds of the retaliatory taxes and fees at issue in this case in the Highway Cash Fund.

THE CLASS

6. Pursuant to Neb. Rev. Stat. §25-319, plaintiff Mark E. Dennis brings this action on behalf of himself and all other vehicle owners which have operated or will operate through the State of Nebraska vehicles which are registered in states against which Nebraska retaliates pursuant to Sections 50-305.02 and 60-305.03, and which have therefore paid or will be required to pay the retaliatory taxes and fees imposed under those sections. The parties comprising

the plaintiff class include hundreds of interstate motor carriers and thus are so numerous as to make joinder of all impracticable. In addition, the claims of law and fact are common to all members of the class.

JURISDICTION

7. This Court has jurisdiction over this action under Article V, §9 of the Nebraska Constitution and Neb. Rev. Stat. §24-302.

FACTS

8. The State of Nebraska requires Nebraska resident motor carriers who own trucks and related equipment to register that equipment with the State and pay an annual registration fee therefor. Non-resident motor carriers from 30 states pay a pro-rated annual registration fee to Nebraska through the International Registration Plan (IRP). Under the IRP, a carrier pays a registration fee solely to its base state, which fee is then divided between the other member states in which it operates. Nonresident motor carriers from all non-IRP states pay pro-rated annual registration fees to Nebraska under various reciprocity agreements, or are permitted to operate in Nebraska without payment of an annual fee pursuant to a reciprocity agreement. Thus, carriers from all states, including Nebraska, must in some manner fulfill Nebraska's registration requirements.

9. Nebraska also imposes a fuel tax on the consumption of motor fuel within the State. This tax is based on the percentage of a carrier's mileage in Nebraska and the amount of fuel consumed within the State. The fuel tax is paid by all motor carriers, including Nebraska-based carriers, regardless of their state of registration.

10. In addition to registration fees and fuel taxes described in paragraphs 9 and 10, Nebraska imposes a "re-

taliatory" tax solely on owner of motor vehicles registered in other states as follows:

> Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska, entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks, truck-tractors, semitrailers, trailers or buses, and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks, truck-tractors, semitrailers, trailers, or buses, owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, in which such trucks, truck-tractors, semitrailers, trailers, or buses are domiciled, grant reciprocity comparable to that extended by the laws of Nebraska.

Neb. Rev. Stat. §60-305.02.

11. The statute further provides:

> In case a foreign state or territory is not reciprocal as to license fees on commercial trucks, truck-tractors, semitrailers, trailers, or buses, the owners of such nonresident vehicles from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks, truck-tractors, semitrailers, trailers, or buses, other than license fees, and the reciprocity law of any other foreign state or territory does not act to exempt Nebraska trucks, truck-tractors, semitrailers, trailers, or buses operating in that state from payment of all fees whatsoever, the owners of such foreign trucks, truck-tractors, semitrailers, trailers, or buses shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks, truck-tractors, semitrailers, trailers, or buses; . . .

Neb. Rev. Stat. §60-305.03.

12. Sections 60-305.02 and 60-305.03 authorize the Nebraska Department of Motor Vehicles to monitor the taxes and fees imposed on Nebraska carriers by other states and to implement retaliatory taxes and fees against carriers whose vehicles are registered in other states as it sees fit. The Department of Roads is authorized to collect the taxes and fees. The statutes further provide that the proceeds of the retaliatory taxes and fees collected under Sections 60-305.02 and 60-305.03 shall be remitted to the State Treasurer, who shall in turn place the money in the Highway Cash Fund.

13. The Nebraska Department of Motor Vehicles has implemented Sections 60-305.02 and 60-305.03 by imposing retaliatory taxes and fees on motor carriers whose vehicles are registered in any one or more of nine states. Thus, motor carriers whose vehicles are registered in Arkansas, Pennsylvania, Arizona, Oregon, Idaho, Nevada, Wyoming, Ohio and New York must, in addition to registration fees and fuel taxes, pay retaliatory taxes and fees to the Department of Roads. The 1984 Reciprocity Manual of the Department of Motor Vehicles and various memoranda of the Department setting forth the amounts of these fees are attached hereto as Exhibit A.

14. Motor carriers whose vehicles are registered in Nebraska pay no fees or taxes pursuant to Sections 60-305.02 and 60-305.03 for their use of the State's roads.

15. Plaintiff Mark E. Dennis owns one vehicle, which is registered in the State of Ohio. On November 17, 1984 Dennis paid the State of Nebraska a retaliatory tax of

two cents per mile, or $9.00, pursuant to Sections 60-305.02 and 60-305.03. See Exhibit B hereto. On November 2, 1983, Dennis paid a retaliatory tax of two cents per mile, or $9.00. See Exhibit C. Dennis continues to operate in Nebraska, and therefore will continue to be subject to the retaliatory taxes imposed pursuant to Sections 60-305.02 and 60-305.03.

COUNT I

Unlawful Burden On Interstate Commerce

16. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

17. The retaliatory taxes and fees imposed on plaintiff and the plaintiff class pursuant to Sections 60-305.02 and 60.305.03 constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution because they are imposed only on motor carriers whose vehicles are registered outside the State of Nebraska, while no comparable tax or fee is imposed on carriers whose vehicles are registered in the State of Nebraska. As such, the State by its taxing scheme favors domestic enterprises over enterprises from other states. Nebraska's retaliatory taxes and fees further impose an unlawful burden on interstate commerce because they vary in amount depending on the particular state of registration. On their face, therefore, the taxes and fees discriminate against interstate commerce. Moreover, the amount of the taxes and fees does not bear a reasonable relationship to the services provided by the State in connection therewith.

COUNT II

Denial of Privileges and Immunities

18. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

19. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.03 constitute a denial of the privileges and immunities of plaintiff and the plaintiff class, whose vehicles are registered outside the State of Nebraska, because they are imposed based on the taxpayers' residence in another state. No comparable tax is imposed on residents of Nebraska. Accordingly, these taxes discriminate against nonresidents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution.

COUNT III

Nebraska Constitution

20. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

21. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.02 constitute a grant by the legislature of special and exclusive privileges, immunities, and franchises to corporations, associations, and individuals operating motor vehicles registered in Nebraska. They therefore violate Article III, Section 18 of the Constitution of the State of Nebraska.

COUNT IV

42 U.S.C. §1983

22. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

23. The actions of defendants set forth in Courts I and II above have been and will continue to be taken under color of state law, custom and usage and threaten to deprive plaintiff of rights secured to him by the United States Constitution. Defendants are therefore liable to plaintiffs pursuant to 42 U.S.C. §1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court grant him and to all members of the plaintiff class:

(a) A declaratory judgment pursuant to Neb. Rev. Stat. §25-21,149 declaring that the retaliatory taxes and fees authorized by Neb. Rev. Stat. §§60-305.02 and 60-305.03 violate the United States Constitution, the Nebraska Constitution, and federal law, and are therefore null and void;

(b) A permanent injunction enjoining the defendants from assessing or collecting retaliatory taxes and fees on non-resident motor carriers under Neb. Rev. Stat. §§60-305.02 and 60-305.03;

(c) Refunds of all retaliatory taxes and fees collected by the defendants pursuant to Neb. Rev. Stat. §§60-305.02 and 60-305.03 prior to the effectiveness of this Court's judgment, with interest;

(d) Attorneys' fees and costs of this action; and

(e) Such other and further relief as this Court may deem just.

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EXHIBIT A

1984 RECIPROCITY MANUAL

INTERSTATE REGISTRATION SECTION

DEPARTMENT OF MOTOR VEHICLES

Nebraska is currently a member of the following apportioned registration agreements:

INTERNATIONAL REGISTRATION PLAN

Alabama	Iowa	Mississippi	Oregon	Utah
Alberta	Illinois	Missouri	Oklahoma	Virginia
Arizona	Kansas	Montana	Pennsylvania	Wisconsin
Arkansas	Kentucky	Nebraska	South Dakota	Wyoming
Colorado	Louisiana	North Dakota	Tennessee	
Idaho	Minnesota	North Carolina	Texas	

UNIFORM PRORATE AND RECIPROCITY AGREEMENT

Alaska	California	New Mexico
British Columbia	Nevada	Washington

Any carrier engaged in operating a fleet of one of more apportionable vehicles in the State of Nebraska may, in lieu of full county registration, license such a fleet under the apportioned registration laws of the State of Nebraska.

An apportionable vehicle shall mean any vehicle except recreational vehicles, vehicles displaying restricted plates, city pick up and delivery vehicles, buses used in transportation of chartered parties, and government owned vehicles, used in two or more jurisdictions that allocate or proportionally register vehicles and is used for the transportation of persons, for hire, or designed, used or maintained primarily for the transportation of property and:

1. is a power unit having a gross weight in excess of 26,000 pounds,

2. is a power unit having three or more axles (on the ground), regardless of weight, or
3. is used in combinations when weight of such combination exceeds 26,000 pounds gross vehicle weight.

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Alabama			$10	80000	none	CGW	9/30	11/16	9/30	11/16	no[1]	yes
Alaska			$10	95000	none	unladen	12/31	6/1	monthly	none	no	yes
Arizona		[4]	$10ST $20CU[2]	80000	none	CGW	12/31	3/1	monthly	none	no	no
Arkansas			$25[1]	80000[2]	1000	CGW	6/30	8/1	monthly	none	no	no
California			$45	80000	none	unladen	12/31	3/1	monthly	none	yes	no
Colorado		$10[1]	$25	80000	none	unladen	12/31	3/1	12/31	3/1	no	no
Connecticut	X			80000	2% lic. wt.	CGW	4/30	5/1	monthly	none	no	yes

Delaware	X			80000	none	CGW	Stag	Stag			no	yes
Dt of Columbia	X			79000	none	CGW	3/31	4/1	3/31	4/1	no	yes
Florida	X			80000	none	CGW	Stag	Stag	Stag	none	no	yes
Georgia	X			80000	none	CGW	12/31	4/2	12/31	4/2	no	yes
Hawaii	X			80800	none	net load	12/31	4/1	12/31	4/1	no	no
Idaho			$5 + .03 /mile	80000	none	CGW	12/31	3/1	monthly	none	no	no
Illinois			$10	80000	none	CGW	12/31	3/1	12/31	[1]	no	no
Indiana	X			80000	none	CGW	2/28	3/1	monthly	none	no	yes
Iowa			$10	80000	*	CGW	12/31	3/15	12/31	3/16	no	no
Kansas			$20	80000	none	CGW	12/31	3/1	[1]	[2]	yes	no
Kentucky			$25	80000	none	CGW	3/31	4/1	monthly	none	no	no
Louisiana			$25	80000	5% lic. wt.	CGW	3/31	4/1	monthly	none	no	yes
Maine	X			80000	**	CGW	12/31	3/1	monthly	none	no	yes
Maryland	X			80000	none	CGW	4/30	5/1	3/31	4/1	no	yes
Massachusetts				80000	none	CGW	12/31	1/1	monthly	none	no	yes

* 5% on non-agricultural, 25% on agricultural
** 10% less than 15,000; 5% greater than 15,000

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Michigan	X			80000	none	CGW	2/28	3/1	3/31	4/1	no	yes
Minnesota			$10	80000	none	CGW	12/31	3/2	monthly	none	no	no
Mississippi	ADD MS as Recip. See X4-13 on Farm Plated Vehicles		$10	80000	none[1]	CGW	10/31	11/1	monthly	[3]	no	yes
Missouri			$10	80000	none	CGW	12/31	3/1	monthly	none	no	yes
Montana			$10 ST $15 CU	80000	none	CGW	12/31	2/16	monthly	none	no	yes
Nevada			$10 + mileage $.02 ST $.04 CU	80000	none	unladen	12/31	2/1	monthly	none	no	no

New Hampshire	X			80000	5% lic. wt.	CGW	3/31	4/1	monthly	none	no	yes
New Jersey	X			80000	none	CGW	3/31	4/1	monthly	none	no	yes
New Mexico			$15 ST $25 CU	86400	none	CGW	12/31	3/3	12/31	3/3	no	no
New York	X [1]	$5 ST 10 CU + mile [2]	$5 ST $10 CU + mile [3]	80000	none	CGW	Stag	Stag	monthly	none	no[1]	no
North Carolina			$15	80000	5%	CGW	12/31	2/16	12/31	2/16	yes	no
North Dakota			$20	80000	none	CGW	12/31	2/2	3/31	5/1	no	yes
Ohio	X [1]	$.01 ST $.02CU [3]	$.01 ST $.02 CU [4]	80000	none	CGW	12/31	3/2	monthly	none	no[1]	no
Oklahoma			$12	80000	none	CGW	12/31	3/2	monthly	none	no	yes
Oregon			$10 + mile[5]	80000	none	gross wt	12/31	3/15	monthly	none	no	yes
Pennsylvania			$15[6]	80000	•	CGW	5/31	6/1	3/31	4/1	no	yes
Rhode Island	X			80000	none	CGW	3/31	4/1	3/31	4/1	no	yes

• 3% on state highways; none on interstate system

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
South Carolina	X			80000	none	net load	11/15	12/1	monthly	none	yes	yes
South Dakota			$15 ST $25 CU	80000	5%	CGW	12/31	4/1	3/31	4/1	no	no
Tennessee			$20	80000	none	CGW	3/31	4/15	monthly	none	no	no
Texas			$25	80000	none	CGW	3/31	4/1	monthly	none	yes	yes
Utah			$10 ST $15 CU	80000	none	CGW	12/31	3/1	monthly	none	no	no
Vermont	X			80000	none	CGW	4/40	5/1	2/28	3/1	no	yes

Virginia			$15	80000	5% lic.wt.	CGW	2/28	4/1	monthly	none	no	yes
Washington			$15 ST $25 CU	80000	none	CGW	12/31	3/1	monthly	none	no	yes
West Virginia	X			80000	5% lic.wt.	CGW	6/30	7/1	monthly	none	no	yes
Wisconsin			$10	80000	none	CGW	12/31	3/1	monthly	none	no	no
Wyoming			$10 + mileage .015 ST .030 CU	80000	none	unladen	12/31	3/1	12/31	3/1	yes	no
Alberta			$10	80000	10000	CGW	3/31	5/1	3/31	4/30	no	yes
British Columbia			$10	80000	none	CGW	2/28	3/1	2/28	3/1	no	no
Manitoba	X			80000	none	CGW	2/28	3/1	2/28	3/1	no	yes
New Brunswick		$10	$10	80000	none	CGW	12/31	4/1	12/31	4/1	no	no
New Foundland		$10	$10	73280	none	CGW	3/31	5/1	3/31	4/1	no	no
Nova Scotia	X			80000	none	CGW	2/28	3/1	12/31	4/1	no	yes
Ontario	X			80000	none	CGW	12/31	4/1	12/31	2/28	no	yes
Prince Ed Isld		$10	$10	74000	none	CGW	3/31	4/1	3/31		no	no

	COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
		Jurisdiction with full-license reciprocity for interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
Quebec			$10	$10	80000	none	CGW	2/28	3/1	2/28	3/1	no	no
Saskatchewan			$10 + .05/ mile	$10 + mileage ?	74000	none	CGW	4/30	5/1	4/30	5/1	no	no
Mexico		X "											

CHART EXPLANATIONS

COLUMN I.

Vehicles properly registered in these jurisdictions shall be granted full license reciprocity on interstate operations provided the vehicle is properly registered. Properly registered shall mean a vehicle licensed or registered in one of the following:

- The jurisdiction where the person registering the vehicle has his/her legal residence, or
- The jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled, and the vehicle is assigned to such principal place of business, or
- The jurisdiction where, because of an agreement or arrangement between two or more jurisdictions, or pursuant to a declaration, the person registering the commercial vehicle has licensed the vehicle as required by said jurisdiction.

Any vehicle not properly registered as defined above shall be subject to purchasing a Trip Permit based upon the jurisdiction determined as the "principal place of business".

EXCEPTIONS:

1. Vehicles properly registered in *New York* and *Ohio* shall be required to purchase a Trip Permit and/or Mileage Permit. *New York* household goods carriers are exempt from Trip Permit and Mileage Permit fees up to 71,000 pounds.
2. *Mexico* - Vehicles properly registered in Mexico and used for private use will be given full license reciprocity

on interstate movement. However, if the vehicle is being used commercially, the owner will be required to purchase a Nebraska Non-Resident Commercial Registration from the County Treasurer.

COLUMN II.

The Trip Permit fees are indicated for each jurisdiction and the permit is valid for 72 hours or for a single trip into the state. *The Trip Permit does not allow intrastate movement.* For purposes of the chart:

CU = Combinations of tractor semitrailers
ST = Straight trucks pulling any type of trailer

1. *Colorado* - Any non-apportioned power unit or combination of vehicles grossing 10,000 pounds or more but not exceeding 26,000 pounds will be required to purchase a Trip Permit for $10.

2. *New York* - Straight Trucks..... $ 5.00
   Tractor Trailer Combination..... $10.00
   Plus: 18,001-28,000 ..... $.010 per mile
   28,001-38,000 ..... .015 per mile
   38,001-48,000 ..... .020 per mile
   48,001-58,000 ..... .025 per mile
   58,001-68,000 ..... .030 per mile
   68,001-78,000 ..... .035 per mile

3. *Ohio* - Straight Trucks..... $.01 per mile
   Tractor Trailer Combination..... $.02 per mile

4. *Arizona* - A non-apportioned Arizona vehicle having a combined gross weight of 12,000-26,000 pounds will be required to purchase an Arizona Motor Carrier Trip Permit at the following rates for each trip:

   $12 - Up to 50 miles
   $48 - More than 50 miles

COLUMN III.

The Trip Permit fees are indicated for each jurisdiction and the permit is valid for 72 hours or for a single trip into the state. *The Trip Permit does not allow intrastate movement.* For purposes of the chart:

CU = Combinations of tractor semitrailers
ST = Straight trucks pulling any type of trailer

1. *Arkansas* - Maximum weight of Arkansas based vehicles allowed in Nebraska is 73,280 pounds without a Reciprocity Permit. These permits allow the vehicle to carry 80,000 pounds at an annual fee of $175 per vehicle and applies to both apportioned and non-apportioned vehicles. In lieu of the Reciprocity Permit, a mileage fee of $.05 per mile travelled in Nebraska may be purchased.

2. *Arizona* - A non-apportioned Arizona vehicle having a combined gross weight of more than 26,000 pounds will be required to purchase a Trip Permit *plus* an Arizona Motor Carrier Trip Permit at the following rates for each trip:

   $12 - Up to 50 miles
   $48 - More than 50 miles

   New York - Straight Trucks ..... $ 5.00
   Tractor Trailer Combination..... $10.00
   Plus: 18,001-28,000..... $.010 per mile
   28,001-38,000..... .015 per mile
   38,001-48,000..... .020 per mile
   48,001-58,000..... .025 per mile
   58,001-68,000..... .030 per mile
   68,001-80,000..... .035 per mile

4. *Ohio* - Straight Trucks..... $.01 per mile
   Tractor Trailer Combination ..... $.02 per mile

5. *Oregon* - 26,001-38,000 ..... $.03 per mile
   38,001-52,000 ..... $.04 per mile
   52,001-80,000 ..... $.05 per mile
6. *Pennsylvania* - Apportioned and non-apportioned vehicles based in Pennsylvania grossing in excess of 26,000 are required to pay a Reciprocity Permit fee of $36 per axle for travel into and thru Nebraska. In lieu of the Reciprocity Permit, a fee of $15 will be assessed for each trip into Nebraska. Non-apportioned vehicles will be required to purchase a $15 Trip Permit in addition to the Reciprocity Permit.
7. *Saskatchewan* - 26,001-50,000 ..... $.10 per mile
   50,001-74,000 ..... $.15 per mile

COLUMN IV.

1. *Alberta* - Metric Conversion for 1 Kilogram = 2.2046 pounds.
2. *Arkansas* - Maximum weight of Arkansas based vehicles allowed in Nebraska is 73,280 without a Reciprocity Permit. These permits allow the vehicle to carry 80,000 pounds at an annual fee of $175 per vehicle and applies to both apportioned and non-apportioned vehicles.

COLUMN V.

1. *Mississippi* - No tolerance (except 2,000 pounds tolerance on liquified compressed gas).

COLUMN IX.

1. *Kansas* - December 31 is the passenger vehicle expiration date *except* for staggered registrations which expire the last day of expiration month.

COLUMN X.

1. *Illinois* - Changes each year but not beyond March 1.
2. *Kansas* - Staggered registrations with no extensions.
   Others - February 16 with March 1 enforcement date.

3. *Mississippi* - Enforcement date of the 16th of the month following the month of expiration.
4. *Prince Edward Island* - Discretion of the Minister with a maximum of 30 days.

COLUMN XI.

1. *Alabama, New York, and Ohio* - These residents attending an accredited school in Nebraska will *not* be required to obtain a Nebraska plate and registration while in attendance at that institution.

DEPARTMENT OF MOTOR VEHICLES
STATE OF NEBRASKA
LINCOLN 68509
(402) 471-2281

MEMORANDUM

TO: All Carrier Enforcement Officers
FROM: Interstate Registration Section
DATE: October 27, 1982
SUBJECT: Arizona Motor Carrier Permit

Effective November 1, 1982, Nebraska will begin charging Arizona based vehicles a Motor Carrier Permit comparable to the permit fee being charged to Nebraska based vehicles operating in Arizona.

The permit fee is to be charged on all vehicles having a combined gross weight of more than 12,000 pounds, including apportioned carriers.

An apportioned vehicle having a combined gross weight of 12,000 pounds or more will be required to purchase an Arizona Motor Carrier Permit only. A non-apportioned vehicle having a combined gross weight of 12,000 to 26,000 pounds will be required to purchase an Arizona Motor Carrier Permit only. A non-apportioned vehicle having a combined gross weight of more than 26,000 pounds will be required to purchase a Prorate Trip Permit *plus* an Arizona Motor Carrier Permit.

MOTOR CARRIER PERMIT FEES:
$12 for up to 50 miles operated on Nebraska Highways
$48 for more than 50 miles operated on Nebraska Highways

Effective January 1, 1983, carriers not obtaining the Motor Carrier Permit should be cited for violation of Nebraska Statute 60-305.02.

If you have any questions, please feel free to call me at 402-471-3891.

ARKANSAS

TRUCKS AND BUSES

An Arkansas licensed vehicle (prorated or non-prorated) licensed or grossing in excess of *73,280 pounds* not displaying reciprocity decal from Nebraska on side of vehicle must purchase a 5¢ a mile trip permit. *This is in addition to the 72 hour $25.00 prorate permit if vehicle is not prorated with Nebraska.*

A vehicle regardless of State of license, leased to an operator from Arkansas, that has a vehicle or combination of vehicles, that grosses in excess of 26,000 pounds empty or loaded, or any power unit with three (3) axles or more regardless of weight, if not prorated with Nebraska, must purchase a 72 hour $25.00 prorate permit.

FARM PLATES

Note: Farm plated truck tractors shall be treated the same as commercial licensed vehicles for trip permit purpose.

SEE ATTACHMENTS

PENNSYLVANIA

TRUCKS AND BUSES

A *Pennsylvania licensed vehicle* (prorated or non-prorated) licensed or grossing in excess of 26,000 pounds not displaying reciprocity decal from Nebraska on side of vehicle must purchase a $15.00 trip permit. *This is in addition to a $15.00 72 hour prorate permit if vehicle is not prorated with Nebraska.*

A vehicle regardless of State of license, leased to an operator from Pennsylvania that has a vehicle having three (3) axles or more on the power unit or grossing in excess of 26,000 pounds, empty or loaded, must prorate with Nebraska or purchase a 72 hour $15.00 prorate permit.

NOTE - FARM PLATE

Farm plated Pennsylvania trucks and farm plated truck-tractor combinations do not need prorate or reciprocity permits of any kind.

SEE ATTACHMENT

NEBRASKA RECIPROCITY QUALIFICATIONS

YEAR 19___

PENNSYLVANIA: Complete Sections A & B

Nebraska requires the payment of a $36 per axle fee on Pennsylvania plated vehicles having a combined gross weight or registered combined gross weight in excess of 26,000 pounds, used on Nebraska highways and which are required to be registered for operation in Nebraska.

Carriers using truck tractors and combinations need to anticipate the number of axles that will be used in combination during the year. For the purpose of this tax, the front wheels on any vehicle are considered to be on an axle.

ARKANSAS: Complete Sections A & C

Nebraska requires the payment of an annual $175 fee on Arkansas plated vehicles having a combined gross weight or registered combined gross weight in excess of 73,280 pounds used on Nebraska highways.

SECTION A

Name		IRP Account #	
Address	City	State	Zip Code

SECTION B

Indicate number of stickers required in each category.

Number of Vehicles	Number of Axles By Category	Amount Due By Category	STATE OFFICE USE ONLY
2 axles ____	x 2 ____	x $36 = $ ____	2 axles ____
3 axles ____	x 3 ____	x $36 = $ ____	3 axles ____
4 axles ____	x 4 ____	x $36 = $ ____	4 axles ____
5 axles ____	x 5 ____	x $36 = $ ____	5 axles ____
6 axles ____	x 6 ____	x $36 = $ ____	6 axles ____
	Total Axles	Total Due	Date ____ Check ____ MO ____ Cash ____ Check/MO # ____

SECTION C

____ Number of Stickers x $175 = $ ____ Total Fees Due

STATE OFFICE USE ONLY
Sticker #'s ____
Date ____
Check ____ MO ____ Cash ____
Check/MO # ____

ALL CHECKS NEED TO BE CERTIFIED. Return to
Department of Motor Vehicles
Interstate Registration Section
P. O. Box 94789
Lincoln, NE 68509

OMV-03-5
11-83

EXHIBIT B

Nebraska Trip Permits for 1983 & 1984

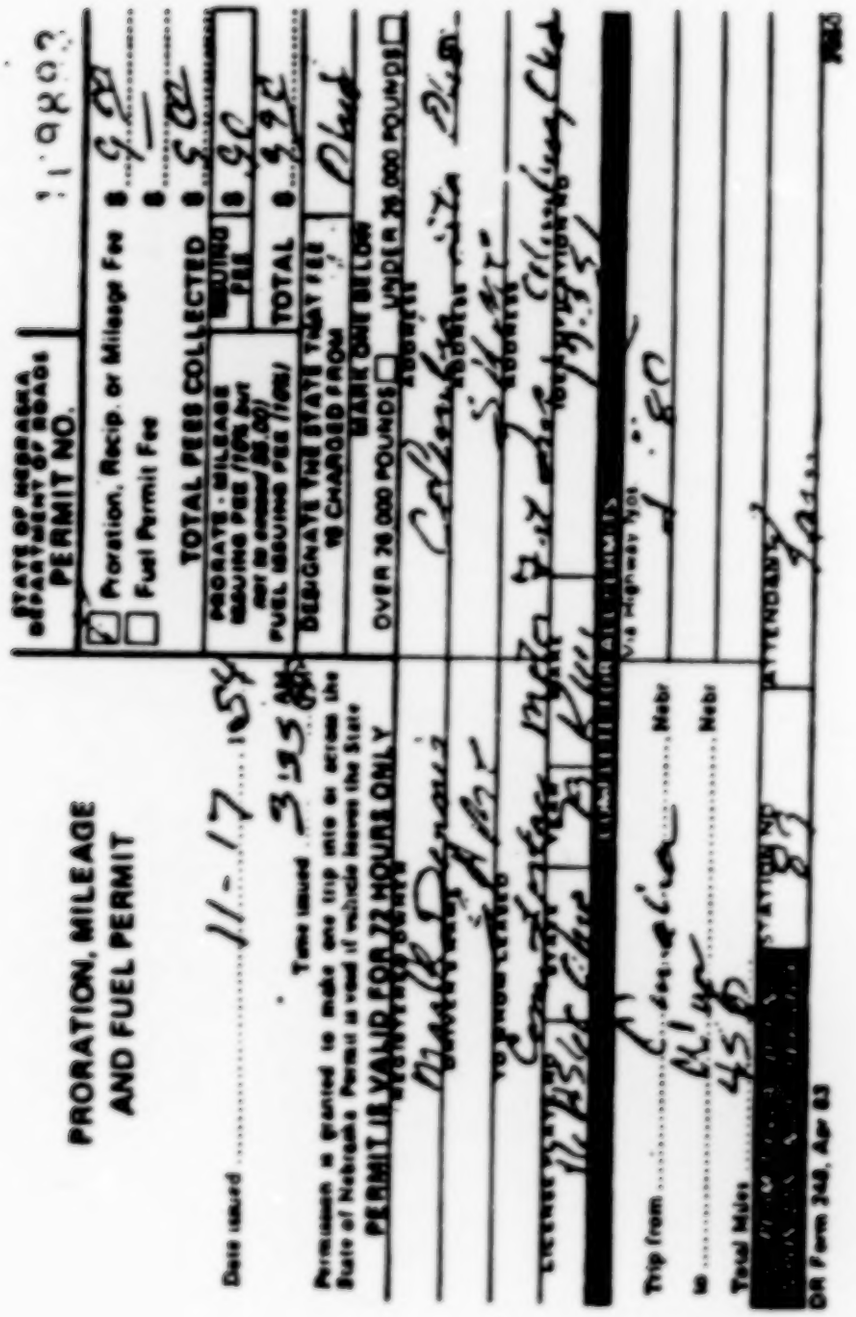
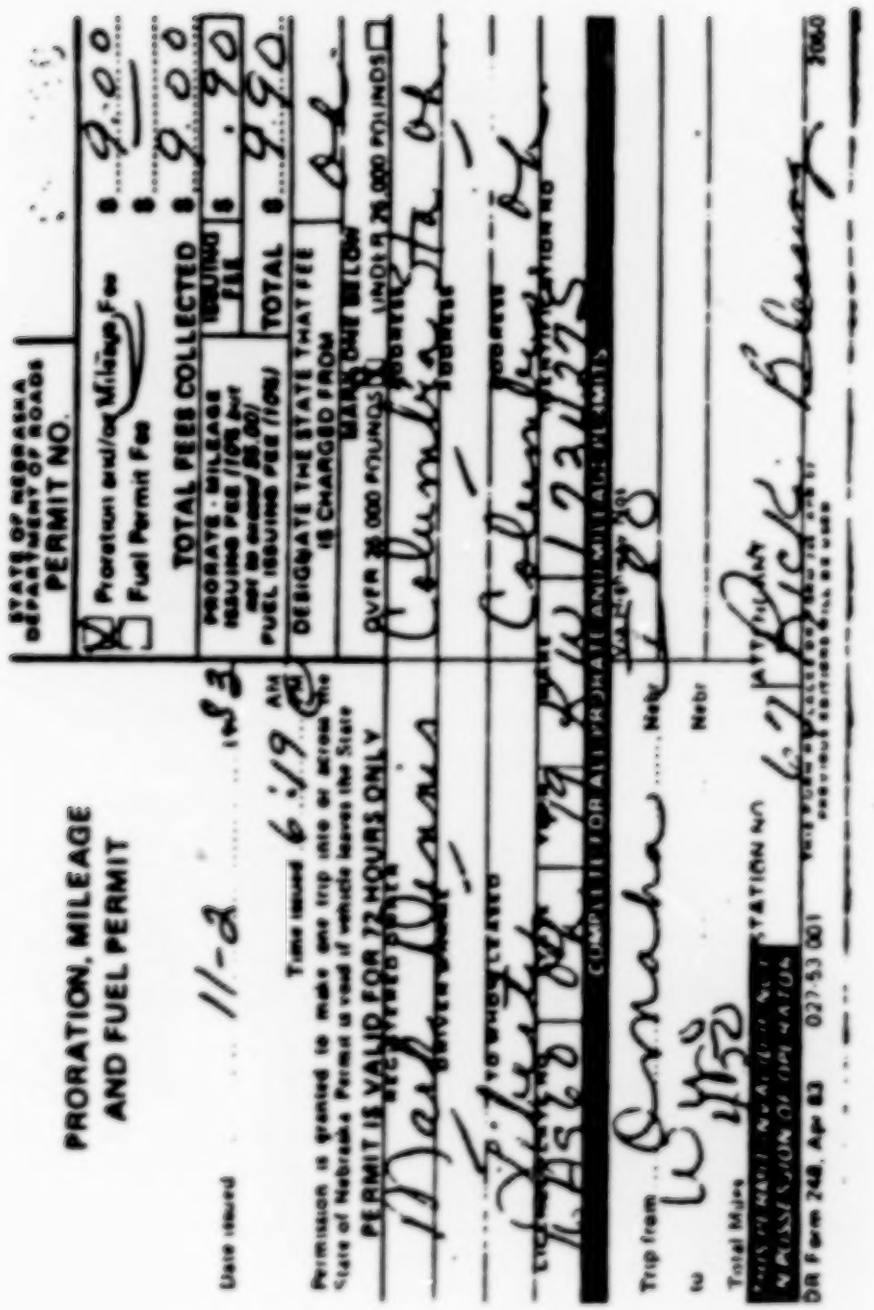


EXHIBIT C



IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Docket 390 Page 26

MARK E. DENNIS, d/b/a DENNIS TRUCKING, *et al*,
Plaintiff

vs.

STATE OF NEBRASKA, *et al*,
Defendant.

ORDER

The motion of the plaintiff to certify a class, the motion of the defendants to strike portions of the amended petition; and defendants' motion to strike plaintiff's motion to certify class and plaintiff's objection to motion to strike came on for hearing on the 30th day of August, 1985, upon the pleadings and files with all counsel present. The matters were argued and briefs now having been submitted and the Court being duly advised in the premises finds as follows:

1. That filing number 5, the motion of the plaintiff to certify class, should be and hereby is overruled.

2. That filing number 7, the motion of defendants to strike plaintiff's motion to certify the class, should be and hereby is sustained.

3. Filing number 6, motion of defendants to strike, should be and hereby is sustained as to paragraphs 1, 2, 4 and 7 of said motion and the balance of said motion is overruled.

4. That in view of the findings of the Court that filings number 8 and 9 are moot.

5. The Court finds that the plaintiff has included matters upon his first amended petition upon which the Court ruled

on June 17, 1985, and if plaintiff continues to allege said matters in a second amended petition that the case should be dismissed at plaintiff's cost.

IT IS FURTHER ORDERED that plaintiff shall be given 21 days in which to file a second amended petition deleting therefrom the matters the Court has ruled in this order. Upon failure to file a second amended petition within said time, the petition shall stand dismissed at plaintiff's costs.

6. If plaintiff files a second amended petition within the time specified herein the defendant shall have ten days to further plead.

IT IS SO ORDERED.

Dated this 19th day of November, 1985.

BY THE COURT:

/s/ Dale E. Fahrnbruch
District Judge

IN THE DISTRICT COURT OF LANCASTER COUNTY
STATE OF NEBRASKA

Docket 390 Page 26

MARK E. DENNIS, doing business as Dennis Trucking,
Plaintiff,

v.

STATE OF NEBRASKA,

and

HOLLY JENSEN, Individually and as Director, Nebraska Department of Motor Vehicles,

and

LOU LAMBERTY, Individually and as Director, Nebraska Department of Roads,

and

KAY ORR, Individually and as Nebraska State Treasurer,
Defendants.

SECOND AMENDED PETITION

1. This is an action for a declaratory judgment pursuant to Neb. Rev. Stat. §25-21,149 *et seq.* to declare retaliatory taxes imposed by Neb. Rev. Stat. §§60-305.02 and 60-305.03 unconstitutional, and to enjoin the defendants from enforcing and collecting the tax.

PARTIES

2. Plaintiff Mark E. Dennis owns and operates Dennis Trucking, a sole proprietorship with its principal place of business in Ohio. He is an owner of a nonresident vehicle for purposes of the taxes and fees imposed under Sections 60-305.02 and 60-305.03, which vehicle is duly authorized to operate in the State of Nebraska.

3. The defendants are the State of Nebraska and various individual State officials responsible for the implementation, collection, and administration of the retaliatory taxes and fees at issue in this case. Defendant Holly Jensen is the Director of Motor Vehicles. The Department of Motor Vehicles is the State agency which has authority, pursuant to Neb. Rev. Stat. §§60-305.02 and 60-305.03, to implement the retaliatory taxes and fees authorized in those sections. The Department of Motor Vehicles is also the State agency which assesses and enforces those retaliatory taxes and fees.

4. Defendant Lou Lamberty is the Director of the Department of Roads. The Department of Roads is the State agency which has authority, pursuant to Neb. Rev. Stat. §60-305.03(1), to act as agent for the Department of Motor Vehicles in collecting the retaliatory taxes and fees being challenged in this case.

5. Defendat Kay Orr is the State Treasurer of Nebraska. The State Treasurer is directed, pursuant to Neb. Rev. Stat. §60-305.03, to place the proceeds of the retaliatory taxes and fees at issue in this case in the Highway Cash Fund.

JURISDICTION

6. This Court has jurisdiction over this action under Article V, §9 of the Nebraska Constitution and Neb. Rev. Stat. §24-302.

FACTS

7. The State of Nebraska requires Nebraska resident motor carriers who own trucks and related equipment to register that equipment with the State and pay an annual registration fee therefor. Non-resident motor carriers from 30 states pay a pro-rated annual registration fee to Nebraska through the International Registration Plan (IRP). Under the IRP, a carrier pays a registration fee solely to its base state, which fee is then divided between the other member

states in which it operates. Nonresident motor carriers from all non-IRP states pay pro-rated annual registration fees to Nebraska under various reciprocity agreements, or are permitted to operate in Nebraska without payment of an annual fee pursuant to a reciprocity agreement. Thus, carriers from all states, including Nebraska, must in some manner fulfill Nebraska's registration requirements.

8. In addition to the registration fees described in paragraph 7, Nebraska imposes a "retaliatory" tax solely on owner of motor vehicles registered in other states as follows:

> Trucks, truck-tractors, semitrailers, trailers, or buses, from states other than Nebraska, entering Nebraska shall be required to comply with all the laws and regulations of any nature imposed on Nebraska trucks, truck-tractors, semitrailers, trailers, or buses, and to comply with all the requirements as to payment of all license fees, permit fees, and fees of whatever character which owners of trucks, truck-tractors, semitrailers, trailers, or buses, owned and operated in Nebraska, are required to pay when operating in such foreign state, unless the state or states, in which such trucks, truck-tractors, semitrailers, trailers, or buses are domiciled, grant reciprocity comparable to that extended by the laws of Nebraska.

Neb. Rev. Stat. §60-305.02.

9. The statute further provides:

> In case a foreign state or territory is not reciprocal as to license fees on commercial trucks, truck-tractors, semitrailers, trailers, or buses, the owners of such nonresident vehicles from those states or territories will be required to pay the same license fees as are charged residents of this state in such foreign state or territory. In case no fees are charged in Nebraska on trucks, truck-tractors, semitrailers, trailers, or buses, other than

> license fees, and the reciprocity law of any other foreign state territory does not act to exempt Nebraska trucks, truck-tractors, semitrailers, trailers, or buses operating in that state from payment of all fees whatsoever, the owners of such foreign truck, truck-tractors, semitrailers, trailers, or buses shall be required to pay a fee in an amount equal to the fee of whatever character, other than license fee, is charged by such other state to foreign trucks, truck-tractors, semitrailers, trailers, or buses; . . .

Neb. Rev. Stat. §60-305.03.

10. Sections 60-305.02 and 60-305.03 authorize the Nebraska Department of Motor Vehicles to monitor the taxes and fees imposed on Nebraska carriers by other states and to implement retaliatory taxes and fees against carriers whose vehicles are registered in other states as it sees fit. The Department of Roads is authorized to collect the taxes and fees. The statutes further provide that the proceeds of the retaliatory taxes and fees collected under Sections 60-305.02 and 60-305.03 shall be remitted to the State Treasurer, who shall in turn place the money in the Highway Cash Fund.

11. The Nebraska Department of Motor Vehicles has implemented Sections 60-305.02 and 60-305.03 by imposing retaliatory taxes and fees on motor carriers whose vehicles are registered in any one or more of nine states. Thus, motor carriers whose vehicles are registered in Arkansas, Pennsylvania, Arizona, Oregon, Idaho, Nevada, Wyoming, Ohio and New York must, in addition to registration fees and fuel taxes, pay retaliatory taxes and fees to the Department of Roads. The 1984 Reciprocity Manual of the Department of Motor Vehicles and various memoranda of the Department setting forth the amounts of these fees are attached hereto as Exhibit A.

12. Motor carriers whose vehicles are registered in Nebraska pay no fees or taxes pursuant to Sections 60-305.02 and 60-305.03 for their use of the State's roads.

13. Plaintiff Mark E. Dennis owns one vehicle, which is registered in the State of Ohio. On November 17, 1984 Dennis paid the State of Nebraska a retaliatory tax of two cents per mile, or $9.00 pursuant to Sections 60-305.02 and 60-305.03. See Exhibit B hereto. On November 2, 1983, Dennis paid a retaliatory tax of two cents per mile, or $9.00. See Exhibit C. Dennis continues to operate in Nebraska, and therefore will continue to be subject to the retaliatory taxes imposed pursuant to Sections 60-305.02 and 60-305.03.

COUNT I

Unlawful Burden On Interstate Commerce

14. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 13 as if fully set forth herein.

15. The retaliatory taxes and fees imposed on plaintiff pursuant to Sections 60-305.02 and 60-305.03 constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution because they are imposed only on motor carriers whose vehicles are registered outside the State of Nebraska, while no comparable tax or fee is imposed on carriers whose vehicles are registered in the State of Nebraska. As such, the State by its taxing scheme favors domestic enterprises over enterprises from other states. Nebraska's retaliatory taxes and fees further impose an unlawful burden on interstate commerce because they vary in amount depending on the particular state of registration. On their face, therefore, the taxes and fees discriminate against interstate commerce. Moreover, the amount of the taxes and fees does not bear a reasonable relationship to the services provided by the State in connection therewith.

COUNT II

Denial of Privileges and Immunities

16. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 13 as if fully set forth herein.

17. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.03 constitute a denial of the privileges and immunities of the plaintiff, whose vehicle is registered outside the State of Nebraska, because they are imposed based on the taxpayer's residence in another state. No comparable tax is imposed on residents of Nebraska. Accordingly, these taxes discriminate against nonresidents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution.

COUNT III

Nebraska Constitution

18. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 13 as if fully set forth herein.

19. The retaliatory taxes and fees imposed pursuant to Sections 60-305.02 and 60-305.02 constitute a grant by the legislature of special and exclusive privileges, immunities, and franchises to corporations, associations, and individuals operating motor vehicles registered in Nebraska. They therefore violate Article III, Section 18 of the Constitution of the State of Nebraska.

COUNT IV

42 U.S.C. §1983

20. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 13 as if fully set forth herein.

21. The actions of defendants set forth in Counts I and II above have been and will continue to be taken under

color of state law, custom and usage and threaten to deprive plaintiff of rights secured to him by the United States Constitution. Defendants are therefore liable to the plaintiff pursuant to 42 U.S.C. §1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court grant him:

(a) A declaratory judgment pursuant to Neb. Rev. Stat. §25-21,149 declaring that the retaliatory taxes and fees authorized by Neb. Rev. Stat. §§60-305.02 and 60-305.03 violate the United States Constitution, the Nebraska Constitution, and federal law, and are therefore null and void;

(b) A permanent injunction enjoining the defendants from assessing or collecting retaliatory taxes and fees on nonresident motor carriers under Neb. Rev. Stat. §§60-305.02 and 60-305.03;

(c) Attorneys' fees and costs of this action; and

(d) Such other and further relief as this Court may deem just.

OF COUNSEL:

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Washington, D.C. 20006

/s/ Jacob Billig
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/s/ Richard L. Spangler, Jr.
RICHARD L. SPANGLER, JR.
Woods, Aitken, Smith,
Greer, Overcash
& Spankler
1500 American Charter
Center
206 South 13th Street
Lincoln, Nebraska 68508

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the above upon Defendant's attorney, Ruth Anne E. Galter, Assistant Attorney General of the State of Nebraska, 2115 State Capitol, Lincoln, Nebraska 68509, by United States Mail, postage prepaid, on this 6th Day of December, 1985.

/s/ Richard L. Spangler, Jr.
Richard L. Spangler, Jr.
Attorney for Plaintiff

EXHIBIT A

1984 RECIPROCITY MANUAL

INTERSTATE REGISTRATION SECTION

DEPARTMENT OF MOTOR VEHICLES

Nebraska is currently a member of the following apportioned registration agreements:

INTERNATIONAL REGISTRATION PLAN

Alabama	Iowa	Mississippi	Oregon	Utah
Alberta	Illinois	Missouri	Oklahoma	Virginia
Arizona	Kansas	Montana	Pennsylvania	Wisconsin
Arkansas	Kentucky	Nebraska	South Dakota	Wyoming
Colorado	Louisiana	North Dakota	Tennessee	
Idaho	Minnesota	North Carolina	Texas	

UNIFORM PRORATE AND RECIPROCITY AGREEMENT

Alaska	California	New Mexico
British Columbia	Nevada	Washington

Any carrier engaged in operating a fleet of one of more apportionable vehicles in the State of Nebraska may, in lieu of full county registration, license such a fleet under the apportioned registration laws of the State of Nebraska.

An apportionable vehicle shall mean any vehicle except recreational vehicles, vehicles displaying restricted plates, city pick up and delivery vehicles, buses used in transportation of chartered parties, and government owned vehicles, used in two or more jurisdictions that allocate or proportionally register vehicles and is used for the transportation of persons, for hire, or designed, used or maintained primarily for the transportation of property and:

1. is a power unit having a gross weight in excess of 26,000 pounds,

2. is a power unit having three or more axles (on the ground), regardless of weight, or
3. is used in combinations when weight of such combination exceeds 26,000 pounds gross vehicle weight.

	Jurisdiction with full license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Alabama			$10	80000	none	CGW	9/30	11/16	9/30	11/16	no[1]	yes
Alaska			$10	95000	none	unladen	12/31	6/1	monthly	none	no	yes
Arizona			$10ST $20CU[2]	80000	none	CGW	12/31	3/1	monthly	none	no	no
Arkansas			$25[1]	80000[2]	1000	CGW	6/30	8/1	monthly	none	no	no
California			$45	80000	none	unladen	12/31	3/1	monthly	none	yes	no
Colorado		$10[1]	$25	80000	none	unladen	12/31	3/1	12/31	3/1	no	no
Connecticut	X			80000	2% lic. wt.	CGW	4/30	5/1	monthly	none	no	yes

Delaware	X			80000	none	CGW	Stag	Stag			no	yes
Dt of Columbia	X			79000	none	CGW	3/31	4/1	3/31	4/1	no	yes
Florida	X			80000	none	CGW	Stag	Stag	Stag	none	no	yes
Georgia	X			80000	none	CGW	12/31	4/2	12/31	4/2	no	yes
Hawaii	X			80800	none	net load	12/31	4/1	12/31	4/1	no	no
Idaho			$5 + .03 /mile	80000	none	CGW	12/31	3/1	monthly	none	no	no
Illinois			$10	80000	none	CGW	12/31	3/1	12/31	[1]	no	no
Indiana	X			80000	none	CGW	2/28	3/1	monthly	none	no	yes
Iowa			$10	80000	*	CGW	12/31	3/15	12/31	3/16	no	no
Kansas			$20	80000	none	CGW	12/31	3/1	[1]	[2]	yes	no
Kentucky			$25	80000	none	CGW	3/31	4/1	monthly	none	no	no
Louisiana			$25	80000	5% lic. wt.	CGW	3/31	4/1	monthly	none	no	yes
Maine	X			80000	**	CGW	12/31	3/1	monthly	none	no	yes
Maryland	X			80000	none	CGW	4/30	5/1	3/31	4/1	no	yes
Massachusetts				80000	none	CGW	12/31	1/1	monthly	none	no	yes

* 5% on non-agricultural, 25% on agricultural
** 10% less than 15,000; 5% greater than 15,000

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
Michigan	X			80000	none	CGW	2/28	3/1	3/31	4/1	no	yes
Minnesota			$10	80000	none	CGW	12/31	3/2	monthly	none	no	no
Mississippi	ADD MS as Recip. See X4-13 on Farm Plated Vehicles		$10	80000	none[1]	CGW	10/31	11/1	monthly	[3]	no	yes
Missouri			$10	80000	none	CGW	12/31	3/1	monthly	none	no	yes
Montana			$10 ST $15 CU	80000	none	CGW	12/31	2/16	monthly	none	no	yes
Nevada			$10 + mileage $.02 ST $.04 CU	80000	none	unladen	12/31	2/1	monthly	none	no	no

New Hampshire	X			80000	5% lic. wt.	CGW	3/31	4/1	monthly	none	no	yes
New Jersey	X			80000	none	CGW	3/31	4/1	monthly	none	no	yes
New Mexico			$15 ST $25 CU	86400	none	CGW	12/31	3/3	12/31	3/3	no	no
New York	X [1]	$5 ST 10 CU + mile [2]	$5 ST $10 CU + mile [3]	80000	none	CGW	Stag	Stag	monthly	none	no[1]	no
North Carolina			$15	80000	5%	CGW	12/31	2/16	12/31	2/16	yes	no
North Dakota			$20	80000	none	CGW	12/31	2/2	3/31	5/1	no	yes
Ohio	X [1]	$.01 ST $.02CU [3]	$.01 ST $.02 CU [4]	80000	none	CGW	12/31	3/2	monthly	none	no[1]	no
Oklahoma			$12	80000	none	CGW	12/31	3/2	monthly	none	no	yes
Oregon			$10 + mile[5]	80000	none	gross wt	12/31	3/15	monthly	none	no	yes
Pennsylvania			$15[6]	80000	*	CGW	5/31	6/1	3/31	4/1	no	yes
Rhode Island	X			80000	none	CGW	3/31	4/1	3/31	4/1	no	yes

* 3% on state highways; none on interstate system

	Jurisdiction with full-license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & grossing 26,000 lbs. or less.	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gross weight of more than 26,000 lbs. or any power unit with 3 or more axles.	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non passenger commercial/apportioned vehicles expiration date.	Enforcement date	Passenger vehicle expiration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
South Carolina	X			80000	none	net load	11/15	12/1	monthly	none	yes	yes
South Dakota			$15 ST $25 CU	80000	5%	CGW	12/31	4/1	3/31	4/1	no	no
Tennessee			$20	80000	none	CGW	3/31	4/15	monthly	none	no	no
Texas			$25	80000	none	CGW	3/31	4/1	monthly	none	yes	yes
Utah			$10 ST $15 CU	80000	none	CGW	12/31	3/1	monthly	none	no	no
Vermont	X			80000	none	CGW	4/40	5/1	2/28	3/1	no	yes
Virginia			$15	80000	5% lic.wt.	CGW	2/28	4/1	monthly	none	no	yes
Washington			$15 ST $25 CU	80000	none	CGW	12/31	3/1	monthly	none	no	yes
West Virginia	X			80000	5% lic.wt.	CGW	6/30	7/1	monthly	none	no	yes
Wisconsin			$10	80000	none	CGW	12/31	3/1	monthly	none	no	no
Wyoming			$10 + mileage .015 ST .030 CU	80000	none	unladen	12/31	3/1	12/31	3/1	yes	no
Alberta			$10	80000[1]	10000	CGW	3/31	5/1	3/31	4/30	no	yes
British Columbia			$10	80000	none	CGW	2/28	3/1	2/28	3/1	no	no
Manitoba	X			80000	none	CGW	2/28	3/1	2/28	3/1	no	yes
New Brunswick		$10	$10	80000	none	CGW	12/31	4/1	12/31	4/1	no	no
New Foundland		$10	$10	73280	none	CGW	3/31	5/1	3/31	4/1	no	no
Nova Scotia	X			80000	none	CGW	2/28	3/1	12/31	4/1	no	yes
Ontario	X			80000	none	CGW	12/31	4/1	12/31	2/28	no	yes
Prince Ed Isld		$10	$10	74000	none	CGW	3/31	4/1	3/31	[4]	no	no

	COLUMN #	I	II	III	IV	V	VI	VII	VIII	IX	X	XI	XII
		Jurisdiction with full license reciprocity for Interstate movement.	Trip Permit cost for non-apportioned power vehicle with 2 axles & gvwscgr 26,000 lbs. or less	Trip Permit cost for non-apportioned vehicle or combination of vehicles with a gvwr weight of more than 26,000 lbs or any power unit with 3 or more axles	Maximum weight allowed in Nebraska	Tolerance	License fees based upon	Non-passenger commercial/apportioned vehicles registration date	Enforcement date	Passenger vehicle registration date	Passenger vehicle enforcement date	Passenger vehicle reciprocity	Farm plated vehicle reciprocity
Quebec			$10	$10	85(000)	none	CGW	2/28	3/1	2/28	3/1	no	no
Saskatchewan			$10 + .05/ mile	$10 + mileage	74(000)	none	CGW	4/30	5/1	4/30	5/1	no	no
Mexico	X	-											

CHART EXPLANATIONS

COLUMN I.

Vehicles properly registered in these jurisdictions shall be granted full license reciprocity on interstate operations provided the vehicle is properly registered. Properly registered shall mean a vehicle licensed or registered in one of the following:

- The jurisdiction where the person registering the vehicle has his/her legal residence, or
- The jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a principal place of business therein, and from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled, and the vehicle is assigned to such principal place of business, or
- The jurisdiction where, because of an agreement or arrangement between two or more jurisdictions, or pursuant to a declaration, the person registering the commercial vehicle has licensed the vehicle as required by said jurisdiction.

Any vehicle not properly registered as defined above shall be subject to purchasing a Trip Permit based upon the jurisdiction determined as the "principal place of business".

EXCEPTIONS:

1. Vehicles properly registered in *New York* and *Ohio* shall be required to purchase a Trip Permit and/or Mileage Permit. *New York* household goods carriers are exempt from Trip Permit and Mileage Permit fees up to 71,000 pounds.
2. *Mexico* - Vehicles properly registered in Mexico and used for private use will be given full license reciprocity

on interstate movement. However, if the vehicle is being used commercially, the owner will be required to purchase a Nebraska Non-Resident Commercial Registration from the County Treasurer.

COLUMN II.

The Trip Permit fees are indicated for each jurisdiction and the permit is valid for 72 hours or for a single trip into the state. *The Trip Permit does not allow intrastate movement.* For purposes of the chart:

CU = Combinations of tractor semitrailers
ST = Straight trucks pulling any type of trailer

1. *Colorado* - Any non-apportioned power unit or combination of vehicles grossing 10,000 pounds or more but not exceeding 26,000 pounds will be required to purchase a Trip Permit for $10.

2. *New York* - Straight Trucks..... $ 5.00
   Tractor Trailer Combination..... $10.00
   Plus: 18,001-28,000 ..... $.010 per mile
   28,001-38,000 ..... .015 per mile
   38,001-48,000 ..... .020 per mile
   48,001-58,000 ..... .025 per mile
   58,001-68,000 ..... .030 per mile
   68,001-78,000 ..... .035 per mile

3. *Ohio* - Straight Trucks..... $.01 per mile
   Tractor Trailer Combination..... $.02 per mile

4. *Arizona* - A non-apportioned Arizona vehicle having a combined gross weight of 12,000-26,000 pounds will be required to purchase an Arizona Motor Carrier Trip Permit at the following rates for each trip:

   $12 - Up to 50 miles
   $48 - More than 50 miles

COLUMN III.

The Trip Permit fees are indicated for each jurisdiction and the permit is valid for 72 hours or for a single trip into the state. *The Trip Permit does not allow intrastate movement.* For purposes of the chart:

CU = Combinations of tractor semitrailers
ST = Straight trucks pulling any type of trailer

1. *Arkansas* - Maximum weight of Arkansas based vehicles allowed in Nebraska is 73,280 pounds without a Reciprocity Permit. These permits allow the vehicle to carry 80,000 pounds at an annual fee of $175 per vehicle and applies to both apportioned and non-apportioned vehicles. In lieu of the Reciprocity Permit, a mileage fee of $.05 per mile travelled in Nebraska may be purchased.

2. *Arizona* - A non-apportioned Arizona vehicle having a combined gross weight of more than 26,000 pounds will be required to purchase a Trip Permit *plus* an Arizona Motor Carrier Trip Permit at the following rates for each trip:

   $12 - Up to 50 miles
   $48 - More than 50 miles

New York - Straight Trucks..... $ 5.00
Tractor Trailer Combination..... $10.00
Plus: 18,001-28,000..... $.010 per mile
28,001-38,000..... .015 per mile
38,001-48,000..... .020 per mile
48,001-58,000..... .025 per mile
58,001-68,000..... .030 per mile
68,001-80,000..... .035 per mile

4. *Ohio* - Straight Trucks..... $.01 per mile
   Tractor Trailer Combination..... $.02 per mile

5. *Oregon* - 26,001-38,000 ..... $.03 per mile
   38,001-52,000 ..... $.04 per mile
   52,001-80,000 ..... $.05 per mile
6. *Pennsylvania* - Apportioned and non-apportioned vehicles based in Pennsylvania grossing in excess of 26,000 are required to pay a Reciprocity Permit fee of $36 per axle for travel into and thru Nebraska. In lieu of the Reciprocity Permit, a fee of $15 will be assessed for each trip into Nebraska. Non-apportioned vehicles will be required to purchase a $15 Trip Permit in addition to the Reciprocity Permit.
7. *Saskatchewan* - 26,001-50,000 ..... $.10 per mile
   50,001-74,000 ..... $.15 per mile

COLUMN IV.

1. *Alberta* - Metric Conversion for 1 Kilogram = 2.2046 pounds.
2. *Arkansas* - Maximum weight of Arkansas based vehicles allowed in Nebraska is 73,280 without a Reciprocity Permit. These permits allow the vehicle to carry 80,000 pounds at an annual fee of $175 per vehicle and applies to both apportioned and non-apportioned vehicles.

COLUMN V.

1. *Mississippi* - No tolerance (except 2,000 pounds tolerance on liquified compressed gas).

COLUMN IX.

1. *Kansas* - December 31 is the passenger vehicle expiration date *except* for staggered registrations which expire the last day of expiration month.

COLUMN X.

1. *Illinois* - Changes each year but not beyond March 1.
2. *Kansas* - Staggered registrations with no extensions.
   Others - February 16 with March 1 enforcement date.

3. *Mississippi* - Enforcement date of the 16th of the month following the month of expiration.
4. *Prince Edward Island* - Discretion of the Minister with a maximum of 30 days.

COLUMN XI.

1. *Alabama, New York, and Ohio* - These residents attending an accredited school in Nebraska will *not* be required to obtain a Nebraska plate and registration while in attendance at that institution.

DEPARTMENT OF MOTOR VEHICLES
STATE OF NEBRASKA
LINCOLN 68509
(402) 471-2281

MEMORANDUM

TO: All Carrier Enforcement Officers
FROM: Interstate Registration Section
DATE: October 27, 1982
SUBJECT: Arizona Motor Carrier Permit

Effective November 1, 1982, Nebraska will begin charging Arizona based vehicles a Motor Carrier Permit comparable to the permit fee being charged to Nebraska based vehicles operating in Arizona.

The permit fee is to be charged on all vehicles having a combined gross weight of more than 12,000 pounds, including apportioned carriers.

An apportioned vehicle having a combined gross weight of 12,000 pounds or more will be required to purchase an Arizona Motor Carrier Permit only. A non-apportioned vehicle having a combined gross weight of 12,000 to 26,000 pounds will be required to purchase an Arizona Motor Carrier Permit only. A non-apportioned vehicle having a combined gross weight of more than 26,000 pounds will be required to purchase a Prorate Trip Permit *plus* an Arizona Motor Carrier Permit.

MOTOR CARRIER PERMIT FEES:
$12 for up to 50 miles operated on Nebraska Highways
$48 for more than 50 miles operated on Nebraska Highways

Effective January 1, 1983, carriers not obtaining the Motor Carrier Permit should be cited for violation of Nebraska Statute 60-305.02.

If you have any questions, please feel free to call me at 402-471-3891.

ARKANSAS

TRUCKS AND BUSES

An Arkansas licensed vehicle (prorated or non-prorated) licensed or grossing in excess of *73,280 pounds* not displaying reciprocity decal from Nebraska on side of vehicle must purchase a 5¢ a mile trip permit. *This is in addition to the 72 hour $25.00 prorate permit if vehicle is not prorated with Nebraska.*

A vehicle regardless of State of license, leased to an operator from Arkansas, that has a vehicle or combination of vehicles, that grosses in excess of 26,000 pounds empty or loaded, or any power unit with three (3) axles or more regardless of weight, if not prorated with Nebraska, must purchase a 72 hour $25.00 prorate permit.

FARM PLATES

Note: Farm plated truck tractors shall be treated the same as commercial licensed vehicles for trip permit purpose.

SEE ATTACHMENTS

PENNSYLVANIA

TRUCKS AND BUSES

A *Pennsylvania licensed vehicle* (prorated or non-prorated) licensed or grossing in excess of 26,000 pounds not displaying reciprocity decal from Nebraska on side of vehicle must purchase a $15.00 trip permit. *This is in addition to a $15.00 72 hour prorate permit if vehicle is not prorated with Nebraska.*

A vehicle regardless of State of license, leased to an operator from Pennsylvania that has a vehicle having three (3) axles or more on the power unit or grossing in excess of 26,000 pounds, empty or loaded, must prorate with Nebraska or purchase a 72 hour $15.00 prorate permit.

NOTE - FARM PLATE

Farm plated Pennsylvania trucks and farm plated truck-tractor combinations do not need prorate or reciprocity permits of any kind.

SEE ATTACHMENT

NEBRASKA RECIPROCITY QUALIFICATIONS

YEAR 19____

PENNSYLVANIA: Complete Sections A & B

Nebraska requires the payment of a $36 per axle fee on Pennsylvania plated vehicles having a combined gross weight or registered combined gross weight in excess of 26,000 pounds, used on Nebraska highways and which are required to be registered for operation in Nebraska.

Carriers using truck tractors and combinations need to anticipate the number of axles that will be used in combination during the year. For the purpose of this tax, the front wheels on any vehicle are considered to be on an axle.

ARKANSAS: Complete Sections A & C

Nebraska requires the payment of an annual $175 fee on Arkansas plated vehicles having a combined gross weight or registered combined gross weight in excess of 73,280 pounds used on Nebraska highways.

SECTION A

Name		IRP Account #	
Address	City	State	Zip Code

SECTION B

Indicate number of stickers required in each category.

Number of Vehicles	Number of Axles By Category	Amount Due By Category	STATE OFFICE USE ONLY
2 axles ____	x 2 ____	x $36 = $____	2 axles ____
3 axles ____	x 3 ____	x $36 = $____	3 axles ____
4 axles ____	x 4 ____	x $36 = $____	4 axles ____
5 axles ____	x 5 ____	x $36 = $____	5 axles ____
6 axles ____	x 6 ____	x $36 = $____	6 axles ____
	Total Axles	Total Due	Date ____ Check ___ MO ___ Cash ___ Check/MO # ____

SECTION C

____ Number of Stickers x $175 = $____ Total Fees Due

ALL CHECKS NEED TO BE CERTIFIED. Return to
Department of Motor Vehicles
Interstate Registration Section
P. O. Box 94789
Lincoln, NE 68509

STATE OFFICE USE ONLY
Sticker #'s ____
Date ____
Check ___ MO ___ Cash ___
Check/MO # ____

OMV-03-92
11-93

EXHIBIT B

Nebraska Trip Permits for 1983 & 1984

PRORATION, MILEAGE AND FUEL PERMIT

STATE OF NEBRASKA DEPARTMENT OF ROADS
PERMIT NO. 11983

☑ Proration, Recip. or Mileage Fee $ 9.00
☐ Fuel Permit Fee $ —
TOTAL FEES COLLECTED $ 9.00

PRORATE - MILEAGE ISSUING FEE (10% but not to exceed $5.00) ISSUING FEE $ .90
FUEL ISSUING FEE (10%) TOTAL $ 9.90

Date issued 11-17 19 84
Time issued 3:35 AM PM

DESIGNATE THE STATE THAT FEE IS CHARGED FROM Okla

Permission is granted to make one trip into or across the State of Nebraska. Permit is void if vehicle leaves the State

PERMIT IS VALID FOR 72 HOURS ONLY

MARK ONE BELOW
OVER 26,000 POUNDS ☐ UNDER 26,000 POUNDS ☐

REGISTERED OWNER: Mark Dennis
ADDRESS: Columbia Sta Okla
DRIVER'S NAME: Self
ADDRESS: Self
TO WHOM LEASED: Con Lehigh Mpls
ADDRESS: Columbus Okla
LICENSE PLATE NO: 11A560 STATE: Okla YEAR: 73 MAKE: KW IDENTIFICATION NO: 19351

COMPLETE FOR ALL PERMITS

Trip from Omaha Nebr
Via Highway Nos. I 80
to Wyo Nebr
Total Miles 450

THIS PERMIT INVALID IF NOT IN POSSESSION OF OPERATOR
STATION NO 87 ATTENDANT Jane

DR Form 248, Apr 83 2060

EXHIBIT C

Nebraska Trip Permits for 1983 & 1984

PRORATION, MILEAGE AND FUEL PERMIT

STATE OF NEBRASKA DEPARTMENT OF ROADS
PERMIT NO. [illegible]

☒ Proration and/or Mileage Fee $ 9.00
☐ Fuel Permit Fee $ —
TOTAL FEES COLLECTED $ 9.00

PRORATE - MILEAGE ISSUING FEE (10% but not to exceed $5.00) ISSUING FEE $ .90
FUEL ISSUING FEE (10%) TOTAL $ 9.90

Date issued 11-2 19 83
Time issued 6:19 AM PM

DESIGNATE THE STATE THAT FEE IS CHARGED FROM Okla.

Permission is granted to make one trip into or across the State of Nebraska. Permit is void if vehicle leaves the State

PERMIT IS VALID FOR 72 HOURS ONLY

MARK ONE BELOW
OVER 26,000 POUNDS ☒ UNDER 26,000 POUNDS ☐

REGISTERED OWNER: Mark Dennis
ADDRESS: Columbia Sta Okla
DRIVER'S NAME: —
ADDRESS: —
TO WHOM LEASED: Liberty
ADDRESS: Columbus Okla
LICENSE PLATE NO: 11A560 STATE: Okla YEAR: 79 MAKE: KW IDENTIFICATION NO: 1221275

COMPLETE FOR ALL PRORATE AND MILEAGE PERMITS

Trip from Omaha Nebr
Via Highway Nos. I 80
to Wyo Nebr
Total Miles 450

THIS PERMIT INVALID IF NOT IN POSSESSION OF OPERATOR
STATION NO 67 ATTENDANT Ricki Bleasing

DR Form 248, Apr 83 027-53 001 THIS FORM REPLACES DR FORM 248 APR 81 PREVIOUS EDITIONS WILL BE USED 2060

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Docket 390 Page 26

MARK E. DENNIS, doing business as Dennis Trucking,
Plaintiff,

v.

STATE OF NEBRASKA; HOLLY JENSEN, Individually and as Director, Nebraska Department of Motor Vehicles; LOU LAMBERTY, Individually and as Director, Nebraska Department of Roads; and KAY ORR, Individually and as Nebraska State Treasurer,
Defendants.

ANSWER TO SECOND AMENDED PETITION

COME NOW the defendants, by and through their attorneys, and for answer to the plaintiff's Second Amended Petition admit, deny, and allege as follows:

1. Defendants admit the factual allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of plaintiff's Second Amended Petition.

2. Defendants deny all conclusions of law contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of plaintiff's Second Amended Petition.

3. Defendants deny the allegations contained in paragraphs 15, 16, 17, 18, 19, 20, and 21 of plaintiff's Second Amended Petition, except for allegations hereinabove admitted, for the reason that said allegations are untrue and are conclusions of law of the pleader.

3. Defendants allege as follows:

a. The State of Nebraska requires Nebraska resident motor carriers who own trucks and related equipment, and who desire to operate the same within the State of Nebraska, to register with the State of Nebraska at the county level and to pay an ad valorem property tax;

b. In lieu of the registration described in paragraph (a) above, Nebraska resident motor carriers may register said vehicles and equipment and pay an annual prorated registration fee to the State of Nebraska pursuant to the International Registration Plan (IRP);

c. Motor carriers in member jurisdictions of the International Registration Plan, choosing to register their fleets of vehicles pursuant to the IRP, pay a prorated annual registration fee to the State of Nebraska if said vehicles are operate in Nebraska. Under the IRP, a carrier pays a registration fee to its base state, which fee is then divided between other member jurisdictions in which it operates;

d. Owners of non-apportioned vehicles registered in member jurisdictions of the IRP pay registration fees to that jurisdiction according to its own statutes and laws;

e. Owners of vehicles registered in jurisdictions that are members of the Uniform Prorate and Reciprocity Agreement pay registration fees to that jurisdiction according to the Agreement or its statutes and laws; and

f. Vehicles registered in foreign jurisdictions and operated in Nebraska pay registration fees to the State of Nebraska as set forth in Exhibit A of the plaintiff's Second Amended Petition, or operate without the payment of registration fees pursuant to negotiated agreements.

4. Defendants allege that the fees and taxes assessed pursuant to Neb.Rev.Stat. §§60-305.02 and 60-305.03 are constitutional in all respects.

WHEREFORE, defendants respectfully pray this court enter an order dismissing the plaintiff's Second Amended Petition; declaring and affirming that the fees and taxes assessed pursuant to Neb.Rev.Stat. §§60-305.02 and 60-305.03 are constitutional and proper in all respects; denying the request for a permanent injunction from the assessment or collection of said fees and taxes; to tax all costs to the plaintiff; and for such other and further relief as may be just and equitable.

STATE OF NEBRASKA; HOLLY JENSEN, Individually and as Director, Nebraska Department of Motor Vehicles; LOU LAMBERTY, Individually and as Director, Nebraska Department of Roads; and KAY ORR, Individually and as Nebraska State Treasurer, Defendants

By ROBERT M. SPIRE, No. 13977
Attorney General

By /s/ Ruth Anne Evans
Ruth Anne Evans, No. 15667
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-4906
Telephone (402) 471-2682

Attorneys for Defendants.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Answer to Second Amended Petition have been served upon the plaintiff by mailing said copies, first class postage prepaid, addressed to plaintiff's counsel of record, Jacob P. Billig, Richard A. Allen, and David F. Smith, 2033 K Street, Northwest, Suite 300, Washington, D.C. 20006; and Richard L. Spangler, Jr., 1500 American Charter Center, 206 South 13th Street, Lincoln, Nebraska, 68508, on this 19th day of December 1985.

/s/ Ruth Anne Evans
Ruth Anne Evans
Assistant Attorney General

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Docket 390 Page 26

MARK E. DENNIS, Doing Business as Dennis Trucking,
Plaintiff,

v.

STATE OF NEBRASKA, *et al.*,
Defendants.

STIPULATION

COME NOW the parties, by and through their attorneys, and stipulate as follows:

1. That the State of Nebraska, through the Department of Motor Vehicles, imposes retaliatory fees and taxes pursuant to Neb.Rev.Stat. §§60-305.02 and 60-305.03 on motor carriers whose vehicles are registered in the following nine states:

Arkansas	Pennsylvania
Arizona	Oregon
Idaho	Nevada
Wyoming	Ohio
New York	

2. That of the foregoing nine states, the following six states are member jurisdictions of the International Registration Plan ("IRP"):

Arkansas	Pennsylvania
Arizona	Oregon
Idaho	Wyoming

The State of Nebraska is also a member jurisdiction of the IRP.

3. That owners of vehicles which are based in member jurisdictions of the IRP may choose to operate and register their vehicles in Nebraska on an apportioned basis under the IRP, or they may choose to register their vehicles solely pursuant to the local laws of their state.

4. That owners of vehicles based in other member jurisdictions of the IRP who choose to register their vehicles in Nebraska pursuant to the IRP pay the applicable Nebraska registration fee on an apportioned basis. All such registration fees paid under the IRP are collected by the carrier's base state and distributed by the state to Nebraska and the other member jurisdictions in which the carrier operates. The base state apportions such fees among the member jurisdictions in which the carrier operates on a mileage basis. For example, if a Pennsylvania-based vehicle operated 20% of its total miles in Nebraska, its owner would pay to Pennsylvania (for distribution to Nebraska) a prorated Nebraska registration fee equal to 20% of the Nebraska registration fee applicable to the vehicle's weight class.

5. That owners of vehicles based in IRP member jurisdictions who do not choose to operate and be registered in Nebraska pursuant to the IRP must purchase a 72-hour trip permit in order to operate in Nebraska.

6. That owners of vehicles based in the IRP member jurisdictions described in paragraph 2 above, and operating in Nebraska, pay fees to Nebraska as follows:

Arkansas

A. The owner of an Arkansas-based vehicle who chooses to apportion under the IRP must pay a prorated Nebraska registration fee to Nebraska in the manner described in paragraph 4 above.
B. An owner of an Arkansas-registered vehicle not apportioned under the IRP must purchase a 72-hour

trip permit for a fee of $25.00 in order to operate in Nebraska.

C. In addition to the fees described in paragraphs A and B above, all owners of Arkansas-registered vehicles that weigh between 73,280 pounds and 80,000 pounds, whether apportioned or nonapportioned, must pay an annual reciprocity permit fee of $175.00 per vehicle. In lieu of the $175.00 fee, owners of Arkansas-registered vehicles may pay a fee of $.05 per mile traveled in Nebraska. This fee mirrors a like charge imposed by Arkansas on owners of Nebraska-registered vehicles which operate in Arkansas.

D. In this case, plaintiff does not contest the lawfulness of the registration fees set forth in paragraphs A and B above. Plaintiff does contest the lawfulness of the fees set forth in paragraph C above.

Pennsylvania

A. An owner of a Pennsylvania-based vehicle who chooses to apportion under the IRP must pay a prorated Nebraska registration fee to Nebraska in the manner described in paragraph 4 above.

B. An owner of a Pennsylvania-registered vehicle not apportioned under the IRP must purchase § 72-hour trip permit for a fee of $15.00 in order to operate in Nebraska.

C. In addition to the fees described in paragraphs A and B above, all owners of Pennsylvania-registered vehicles, whether apportioned or nonapportioned, are required to pay an annual per vehicle reciprocity permit fee of $36.00 per axle for travel into and through Nebraska. In lieu of the $36.00 per axle reciprocity permit fee described above, owners of Pennsylvania-registered vehicles may pay a reciprocity fee of $15.00 for each trip into Nebraska. This fee mirrors a like charge imposed by Pennsylvania on owners of

Nebraska-registered vehicles which operate in Pennsylvania.

D. In this case, plaintiff does not contest the lawfulness of the registration fees set forth in paragraphs A and B above. Plaintiff does contest the lawfulness of the fees set forth in paragraph C above.

Arizona

A. An owner of an Arizona-based vehicle who chooses to apportion under the IRP must pay a prorated Nebraska registration fee to Nebraska in the manner described in paragraph 4 above.

B. An owner of an Arizona-registered vehicle not apportioned under the IRP must purchase a 72-hour trip permit for a fee of $10.00 (for a straight truck) or $20.00 (for a tractor-trailer combination) in order to operate in Nebraska.

C. In addition to the fees described in paragraphs A and B above, all owners of Arizona-registered vehicles having a combined gross weight of 12,000 pounds or more, whether apportioned or nonapportioned, are required to pay a fee of $12.00 (for up to 50 miles operated on Nebraska highways) or $48.00 (for more than 50 miles operated on Nebraska highways). This fee mirrors a like charge imposed by Arizona on owners of Nebraska-registered vehicles which operate in Arizona.

D. In this case, plaintiff does not contest the lawfulness of the registration fees set forth in paragraphs A and B above. Plaintiff does contest the lawfulness of the fees set forth in paragraph C above.

Oregon

A. An owner of an Oregon-based vehicle who chooses to apportion under the IRP must pay a prorated

Nebraska registration fee to Nebraska in the manner described in paragraph 4 above.

B. An owner of an Oregon-registered vehicle not apportioned under the IRP must purchase a 72-hour trip permit for a fee of $10.00 in order to operate in Nebraska.

C. In addition, all owners of Oregon-registered vehicles not apportioned under the IRP are required to pay one of the following fees, depending on vehicle weight, in order to operate in Nebraska:

26,001 to 38,000 pounds - $.03 per mile
28,001 to 52,000 pounds - $.04 per mile
52,001 to 80,000 pounds - $.05 per mile

This fee mirrors a like charge imposed by Oregon on owners of Nebraska-registered vehicles which operate in Oregon.

D. In this case, plaintiff does not contest the lawfulness of the registration fees set forth in paragraphs A and B above. Plaintiff does contest the lawfulness of the fees set forth in paragraph C above.

Idaho

A. An owner of an Idaho-based vehicle who chooses to apportion under the IRP must pay a prorated Nebraska registration fee to Nebraska in the manner described in paragraph 4 above.

B. An owner of an Idaho-registered vehicle not apportioned under the IRP must purchase a 72-hour trip permit for a fee of $5.00 in order to operate in Nebraska.

C. In addition, all owners of Idaho-registered vehicles not apportioned under the IRP are required to pay a fee of $.03 per mile in order to operate in Nebraska. This fee mirrors a like charge imposed by

Idaho on owners of Nebraska-registered vehicles which operate in Idaho.

D. In this case, plaintiff does not contest the lawfulness of the registration fees set forth in paragraphs A and B above. Plaintiff does contest the lawfulness of the fees set forth in paragraph C above.

Wyoming

A. An owner of a Wyoming-based vehicle who chooses to apportion under the IRP must pay a prorated Nebraska registration fee to Nebraska in the manner described in paragraph 4 above.

B. An owner of a Wyoming-registered vehicle not apportioned under the IRP must purchase a 72-hour trip permit for a fee of $10.00 in order to operate in Nebraska.

C. In addition, all owners of Wyoming-registered vehicles not apportioned under the IRP are required to pay a fee of $.015 per mile (for straight trucks pulling any type of trailer) or $.030 per mile (for a combination of a tractor and semitrailer) in order to operate in Nebraska. This fee mirrors a like charge imposed by Wyoming on owners of Nebraska-registered vehicles which operate in Wyoming.

D. In this case, plaintiff does not contest the lawfulness of the registration fees set forth in paragraphs A and B above. Plaintiff does contest the lawfulness of the fees set forth in paragraph C above.

7. That owners of vehicles based in the State of Nevada may register those vehicles to operate in Nebraska pursuant to the Uniform Prorate and Reciprocity Agreement ("UPRA"). Such carriers must pay directly to Nebraska (rather than through their base state, as under the IRP) a prorated Nebraska registration fee calculated according to the percentage of the vehicle's total miles which are

operated in Nebraska. For example, the owner of a Nevada-based vehicle with 30% of its total miles operated in Nebraska would pay to Nebraska a prorated registration fee equal to 20% of the Nebraska registration fee applicable to the vehicle's weight class. Alternatively, owners of Nevada-based vehicles which operate in Nebraska may choose not to register their vehicles in Nebraska under the UPRA, but may instead choose to register their vehicles solely pursuant to the laws of Nevada.

A. An owner of a Nevada-based vehicle who chooses to apportion under the UPRA must pay a prorated Nebraska registration fee to Nebraska in the manner described above.

B. An owner of a Nevada-registered vehicle not apportioned under the UPRA must purchase a 72-hour trip permit for a fee of $10.00 in order to operate in Nebraska.

C. In addition, all owners of Nevada-registered vehicles not apportioned under the UPRA must pay a fee of $.02 per mile (for straight trucks) or $.04 per mile (for a combination of a tractor and semitrailer). This fee mirrors a like charge imposed by Nevada on owners of Nebraska-registered vehicles which operate in Nevada.

D. In this case, plaintiff does not contest the lawfulness of the registration fees set forth in paragraphs A and B above. Plaintiff does contest the lawfulness of the fees set forth in paragraph C above.

8. That pursuant to a reciprocity agreement between the State of Nebraska and the State of New York, owners of vehicles which are registered in the State of New York are granted full license reciprocity for interstate movement in Nebraska and accordingly pay no registration fees to Nebraska. However, when operating in Nebraska, owners of such vehicles must pay a fee equal to the sum of $5.00

(for straight trucks) or $10.00 (for tractor-trailer combinations) per trip *plus*:

18,001 to 28,000 pounds - $.010 per mile
28,001 to 38,000 pounds - $.015 per mile
38,001 to 48,000 pounds - $.020 per mile
48,001 to 58,000 pounds - $.025 per mile
58,001 to 68,000 pounds - $.030 per mile
68,001 to 80,000 pounds - $.035 per mile

This fee mirrors a like charge imposed by New York on owners of Nebraska-registered vehicles which operate in New York. Plaintiff contests the lawfulness of this fee.

9. That pursuant to a reciprocity agreement between the State of Nebraska and the State of Ohio, owners of vehicles which are registered in the State of Ohio are granted full license reciprocity for interstate movement in Nebraska and accordingly pay no registration fees to Nebraska. However, when operating in Nebraska, owners of such vehicles must pay a fee of one cent per mile (straight trucks) or two cents per mile (tractor-trailer combination). This fee mirrors a like charge imposed by Ohio on owners of Nebraska-registered vehicles which operate in Ohio. Plaintiff contests the lawfulness of this fee.

10. Plaintiff, Mark E. Dennis, doing business as Dennis Trucking, pays no other fees to the State of Nebraska other than the one cent or two cent per mile fee described in paragraph 9 above.

11. That unless otherwise specified, the fees and taxes set forth in paragraphs 6-9 above apply only to vehicles with a gross weight in excess of 26,000 pounds.

12. That the trip permits described in paragraphs 6-7 are valid for 72 hours or for a single trip into the State of Nebraska. The trip permit does not allow intrastate movement.

13. That motor carriers whose vehicles are registered in the nine states set forth in paragraph 1 above, and in

all other states, are required to pay a quarterly Interstate Motor Carrier Fuel Tax of 17.2 cents for each gallon of fuel consumed or a fee of $10 for a 72-hour fuel permit while operating in the State of Nebraska. Plaintiff does not contest the lawfulness of the fuel tax in this case.

14. That owners of vehicles which are based or registered in the State of Nebraska do not pay any of the fees or taxes described in paragraphs 6-13 above, with the exception of Nebraska registration fees (which may or may not be apportioned under the IRP) and the Nebraska Interstate Motor Carrier Fuel Tax.

15. That the taxes and fees at issue are imposed by the State of Nebraska based upon the jurisdiction in which a vehicle is registered.

16. That plaintiff, Mark E. Dennis, doing business as Dennis Trucking, is a motor carrier who operates one tractor and two trailers in interstate commerce. Mr. Dennis' tractor is registered in Ohio, and he is therefore subject to the tax imposed under Neb.Rev.Stat. §§60-305.02 and 60-305.03 when he operates in Nebraska. He has paid to Nebraska the following taxes pursuant to that statute: $9.00 on November 17, 1984; $9.60 on December 9, 1983; $9.00 on December 4, 1983; $9.00 on November 2, 1983; $7.00 on September 13, 1983; and $9.00 on June 1, 1983.

17. That if the plaintiff would have registered his 1979 Kenworth truck-tractor, with gross vehicle weight of 80,000 pounds, in the State of Nebraska, his Nebraska registration fee, calculated pursuant to Neb.Rev.Stat. §60-331, would have been $930.00 each year in 1983 and 1984.

18. That the plaintiff paid registration fees to the State of Ohio, for registration of the Kenworth tractor-trailer, in the amount of $413 each year in 1983 and 1984.

19. That the plaintiff has paid the the State of Ohio the Ohio mileage tax referred to in paragraph 9 above in connection with the operation of his tractor-trailer in the State

of Ohio. The amount of such tax payments in 1984 was $106.

STATE OF NEBRASKA, et al.,
Defendants,

BY ROBERT M. SPIRE, #13977
Attorney General

BY /s/ Ruth Anne Evans
Ruth Anne Evans, #15667
Special Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-4906
Tel: (402) 471-2682

Attorneys for Defendants.

MARK E. DENNIS, Doing Business as Dennis Trucking, Plaintiff,

BY /s/ Richard A. Allen
Richard A. Allen
Zuckert, Scoutt, Rasenberger, and Johnson
888 Seventeenth Street
Washington, DC 20006
Tel: (202) 298-8660

BY /s/ Richard L. Spangler, Jr.
Richard L. Spangler, Jr.
#13956
Woods, Aitken, Smith, Greer, Overcash & Spangler
1500 American Charter Center
206 South 13th Street
Lincoln, NE 68509
Tel: (402) 474-0321

Attorneys for Plaintiff.

No. 89-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents.

On Writ of Certiorari
to the Supreme Court of Nebraska

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a claim that a state tax discriminates against interstate commerce in violation of the Commerce Clause and that seeks an injunction against enforcement of the tax is cognizable under 42 U.S.C. § 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1555

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents.[1]

On Writ of Certiorari
to the Supreme Court of Nebraska

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska (Pet. App. 1a-27a) is reported at 234 Neb. 427, 451 N.W.2d 676 (1990). The opinion of the District Court of Lancaster County (Pet. App. 28a-30a) is not reported.

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[1] Petitioner is Mark E. Dennis. Respondents are the following officials of the State of Nebraska: Margaret L. Higgins, Director, Nebraska Department of Motor Vehicles, Gerald C. Strobel, Director, Nebraska Department of Roads, and Frank Marsh, Nebraska State Treasurer. Respondents are successors in office to other officials whom petitioner sued in their official capacities for injunctive relief.

The judgment of the District Court of Lancaster County denying petitioner's motions for class certification and preliminary injunction is set forth at Pet. App. 31a-35a.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on February 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . .
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Pertinent provisions of Nebraska's retaliatory tax statute, Nebraska Rev. Stat. § 60-305 (Reissue 1984), are set forth at Pet. App. 36a-37a.

STATEMENT

In this case, petitioner filed a class action suit in a Nebraska state court on December 17, 1984 challenging the constitutionality of certain "retaliatory taxes" that the State of Nebraska imposed on motor carriers, including petitioner, who operated trucks in Nebraska that were registered in certain other states. The Supreme Court of Nebraska affirmed a trial court decision declaring that Nebraska's retaliatory taxes violated the Commerce Clause of the United States Constitution, but it held that this violation did not deprive petitioner of personal constitutional "rights" and therefore did not entitle petitioner to relief under 42 U.S.C. § 1983 or to litigation costs and attorney's fees under 42 U.S.C. § 1988.

A. Nebraska's Retaliatory Taxes

Nebraska, like most other states, imposes a variety of fees and taxes on motor carriers operating in the State, such as fees for the registration of vehicles and taxes for the use of fuel in the state. In addition, until it was recently amended, Neb. Rev. Stat. § 60-305 (Reissue 1984) authorized respondents, various state officials, to levy additional taxes, commonly known as "retaliatory taxes," which were imposed only on carriers operating vehicles in Nebraska that were registered in certain other states and were not imposed on Nebraska-registered vehicles (Pet. App. 36a-37a). The purpose of § 60-305 was to retaliate against states imposing so-called "third structure

taxes,"[2] which certain states have imposed on all motor carriers operating in those states, including Nebraska-registered carriers, and to which Nebraska objected. Section 60-305 carried out this purpose by authorizing respondents to impose taxes on carriers registered in those states that operate in Nebraska which taxes are equal in amount to the third structure tax imposed by the carriers' state of registration. By thus penalizing carriers from third structure tax states, Nebraska's legislature hoped to pressure the legislatures of those states to repeal their third structure taxes or exempt Nebraska-based carriers from them.

Respondents implemented § 60-305 by imposing retaliatory taxes on carriers whose vehicles were registered in nine states: Arizona, Arkansas, Idaho, Nevada, New York, Ohio, Oregon, Pennsylvania and Wyoming. (Pet. App. 22a).

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[2] A "third structure tax" is one that is imposed on motor carriers in addition to the more traditional charges states have levied on such carriers, which are registration fees and fuel taxes (so-called "first" and "second structure" taxes). Examples of third structure taxes include ton-mile taxes, which are based on the weight of trucks and the mileage operated in the taxing state, and axle taxes, which impose a flat charge based on the number of axles on each vehicle. In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987), this Court invalidated one such third structure tax, Pennsylvania's axle tax. The Court noted that flat taxes like Pennsylvania's had prompted Nebraska and six other states to enact retaliatory taxes, and it stated: "Such taxes can obviously divide and disrupt the market for interstate transportation services." *Id.* at 285 (footnotes omitted).

B. Proceedings Below

Petitioner Mark E. Dennis, doing business as Dennis Trucking, is a motor carrier residing in Royalton, Ohio, who began operating in 1978 with one truck. Petitioner and his wife now own and operate four tractors and six trailers in several states, including Nebraska. His tractors are registered in Ohio, which imposes a two cents per mile third structure tax. Petitioner was therefore subject to and paid Nebraska's retaliatory tax (J.A. 149, 150).

Petitioner filed a complaint in a Nebraska state court on December 17, 1984 as a class action seeking injunctive and declaratory relief and refunds (J.A. 5).[3]

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[3] Petitioner was joined as a plaintiff in his original complaint by the Private Truck Council of America, Inc. ("PTCA") (now the National Private Truck Council, Inc.), a trade association of private motor carriers, many of whose members were subject to Nebraska's retaliatory tax. The trial court, however, dismissed PTCA as a plaintiff on the ground that it lacked standing because it was not itself subject to the tax (Pet. App. 33a).

PTCA and other motor carriers that were subject to retaliatory taxes had filed suits in December 1984 and January 1985 against Nebraska and the six other states that had enacted retaliatory motor carrier taxes, Maine, New Hampshire, New Jersey, Georgia, Florida, and Oklahoma. Each of those actions has resulted in final state court decisions invalidating the taxes. *Private Truck Council of America, Inc. v. Sec'y of State*, 503 A.2d 214 (Me.), *cert. denied*, 476 U.S. 1129 (1986); *Private Truck Council of America, Inc. v. New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986); *Private Truck Council of America, Inc. v. New Jersey*, 221 N.J. Super. 89, 534 A.2d 13 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 111 N.J. 214, 544 A.2d 33 (1988); *Georgia v. Private Truck Council of America, Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Private Truck Council of America, Inc. v. Florida Department of Revenue*, 531 So.2d 367 (Fla. Dist. Ct. App. 1988);

The complaint alleged that Neb. Rev. Stat. § 60-305 (Reissue 1984) discriminated on its face against interstate commerce and out-of-state residents in violation of the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution (*id.* at 11). It also alleged that the respondents were therefore liable to petitioner under 42 U.S.C. § 1983 (*id.* at 12). Upon filing his complaint, petitioner moved for a preliminary injunction or, alternatively, for an order requiring the tax collections to be held in escrow pending the outcome of the suit.[4]

The trial court denied petitioner's motion for a preliminary injunction or an escrow order and his motion for class certification (Pet. App. 35a). After a hearing on stipulated facts, the trial court, on September 30, 1987, issued a decision declaring the challenged taxes unconstitutional as an unlawful burden on interstate commerce in violation of the Commerce Clause. The court concluded: "On their face said taxes and fees discriminate against interstate commerce" (*id.* at 29a). Accordingly, it permanently enjoined respondents from assessing, levying or collecting the taxes (*id.* at 30a). The court, however, denied without explanation petitioner's claim under 42 U.S.C. § 1983 (*id.*).

With respect to the entitlement of petitioner and other taxpayers to refunds, the court held that all taxpayers would have to file claims for refunds with

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Private Truck Council of America, Inc. v. Oklahoma Tax Commission, No. 68,401 (Okla. June 28, 1990).

[4] Escrow orders have often been issued in suits of this kind. Justice Blackmun issued such an order in *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1310 (1987).

the Nebraska Department of Administrative Services (Pet. App. 30a). The court also held that petitioner and his attorneys would be entitled to payment of their costs and attorney's fees under the equitable "common fund" doctrine, but it denied without comment their request for a determination that the pertinent common fund would be all the taxes that would be subject to refund as a result of the court's judgment (*id.*). Since petitioner had paid less than $100 in taxes[5] and since his motion to proceed as a class action had been denied, the court effectively held that there was no common fund from which litigation expenses and attorney's fees could be recovered.

Petitioner appealed the denial of his claim under 42 U.S.C. § 1983 and the denial of his claim regarding the composition of the common fund. Respondents did not cross-appeal the trial court's invalidation of the tax but did cross-appeal its ruling—albeit a meaningless one—that there was any common fund entitlement to fees and expenses.

On February 16, 1990, the Nebraska Supreme Court affirmed the trial court's denial of petitioner's claim under 42 U.S.C. § 1983, but reversed its holding that petitioner and his attorneys had even a theoretical right to recover fees and expenses under the common fund doctrine (Pet. App. 1a-27a). On the latter point, the court held that there was no such right because there was no fund, inasmuch as class certification had been denied and refunds to taxpayers would depend

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[5] The parties stipulated that petitioner paid a total of $52.60 in retaliatory taxes to Nebraska in 1983 and 1984, the only years covered by the stipulation (J.A. 150).

on the filing of individual refund claims and on case-by-case determinations of their merits (*id.* at 23a-27a).

With respect to petitioner's claim under 42 U.S.C. § 1983 the court held:

> Despite the broad language of § 1983 and the fact that there appears to be a division of authority on the question as to whether there is a cause of action under § 1983 for violations of the commerce clause, we believe the better reasoned cases hold that there is no cause of action under § 1983 for violations of the commerce clause.

(Pet. App. 5a). The court relied primarily on *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984), which held that "the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments."

SUMMARY OF ARGUMENT

The Nebraska Supreme Court erred in holding that there is no cause of action under 42 U.S.C. § 1983 for violations of Article I, Section 8, Clause 3 of the federal Constitution, the Commerce Clause.

1. Section 1983 provides a remedy for the "deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws" (emphasis supplied) by a person acting under color of a state statute, ordinance, etc. As this Court has consistently held, the plain language and legislative history of § 1983 establish that it provides a remedy for state deprivations of *all* federal constitutional and statutory

rights and is not limited to some subset of such rights. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Contrary to this Court's consistently broad construction, the decision below would carve an exception for certain types of constitutional violations from the coverage of § 1983. No such exception is warranted. Congress has not chosen to restrict in any way the coverage of § 1983 despite this Court's longstanding interpretation of the statute. On the contrary, the only change Congress has made to § 1983 since its original enactment was to amend it in 1979 to broaden its scope. Accordingly, creating new exceptions to the scope of the statute should be left to Congress. *See, e.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 58 U.S.L.W. 4862 (1990).

2. There is no merit to the Nebraska Supreme Court's view that the Commerce Clause does not establish individual rights but only allocates powers among state and federal governments. This Court's decisions make clear that many constitutional provisions which allocate powers among governmental entities also give rise to rights which individuals can enforce judicially. Virtually throughout its history, the decisions of this Court have established beyond question that the Commerce Clause not only restricts the power of the states but also, in so doing, secures rights, which individuals can enforce through the courts, to engage in commerce and travel among the states free of discriminatory state laws and taxes. *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977) (stock exchanges could assert "their right under the Commerce Clause to engage in interstate commerce free of dis-

criminatory taxes"); *Morgan v. Virginia*, 328 U.S. 373, 376-377 (1946) (individual had standing to invoke the Commerce Clause in her challenge of a state statute requiring racial segregation on interstate buses). The ruling of the Nebraska Supreme Court cannot be reconciled with this Court's Commerce Clause jurisprudence.

3. Contrary to the decision below, whether a constitutional or statutory provision establishes a personal right cognizable under § 1983 does not turn on whether the provision is one that allocates power between the federal and state governments.

a. A test for rights based on power allocation is inconsistent with the test this Court has specifically fashioned for determining what constitutes a "right" for purposes of § 1983. Under this Court's test, which it summarized in *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. at 448, it is clear that the Commerce Clause secures rights within the meaning of § 1983 because it imposes specific obligations on states and because the interests of persons invoking the protections of the Clause are not "beyond the competence of the judiciary to enforce" (*Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 432 (1987)), as numerous cases enforcing those protections attest.

b. This Court has expressly rejected a test for rights based on power allocation. Most recently, in *United States v. Munoz-Flores*, 58 U.S.L.W. 4563 (1990), the Court held that the Origination Clause of Article I, § 7, which requires revenue measures to originate in the House of Representatives, is a source of individual rights and specifically rejected the Government's contention to the contrary. *See also Davis v. Michigan*

Department of Treasury, 109 S. Ct. 1500 (1989), rejecting the contention that the intergovernmental tax immunity doctrine is not a source of individual rights. Many other decisions of this Court have similarly upheld individual rights based on power-allocating provisions or doctrines, such as the separation of powers doctrine, the principle of bicameralism and the requirements of Article III.

c. Contrary to the view of the Eighth Circuit in *Consolidated Freightways Corp. v. Kassel*, 730 F.2d at 1145-1146, the legislative history of § 1983 does not support the conclusion that the statute does not apply to violations of the Commerce Clause. The Eighth Circuit's view that Congress intended § 1983 to apply only to "important" rights "akin to fundamental rights protected by the Fourteenth Amendment" was expressly rejected by this Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), and *Maine v. Thiboutot*, 448 U.S. 1 (1980). The brief remarks of Rep. Shellabarger on which the Eighth Circuit relied do not appear to have concerned the scope of what became § 1983 and did not refer to the Commerce Clause. His remarks cannot in any event overcome the plain language of the statute and this Court's consistent decisions construing it.

ARGUMENT

PETITIONER'S CLAIM FOR INJUNCTIVE RELIEF AGAINST STATE TAXES THAT DISCRIMINATE IN VIOLATION OF THE COMMERCE CLAUSE STATES A CLAIM UNDER 42 U.S.C. § 1983

Before turning to the merits, it is important to identify what issues are and what issues are not before the Court in this case.

The only issue that is before the Court to decide is whether 42 U.S.C. § 1983 provides a remedy to persons who are injured by a state's violation of the Commerce Clause. Whether or not Nebraska's retaliatory taxes did in fact violate the Commerce Clause is not at issue. The trial court held that they did violate the Commerce Clause, and since respondents did not appeal that ruling to either the Nebraska Supreme Court or to this Court, the violation of the Commerce Clause must be taken as a given for purposes of resolving the issue in this case.[6]

The § 1983 issue is important principally for purposes of petitioner's entitlement to costs and attorney's fees under the portion of the Civil Rights

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[6] Petitioner, of course, believes that the trial court's ruling was clearly correct under this Court's Commerce Clause jurisprudence, as six other state supreme courts have concluded in striking down similar retaliatory truck taxes (*see* note 3, *supra*) and as this Court itself appeared to acknowledge in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987). Any questions one might have about the Court's Commerce Clause jurisprudence, however, (*see, e.g.*, Justice Scalia's dissent in *Scheiner* (483 U.S. at 303-306)) should have no bearing on the issue in this case. The only issue here is, if a state does violate the Commerce Clause as that Clause has been applied by this Court, whether § 1983 provides a remedy to a person who is injured by that violation. For purposes of that issue the Commerce Clause violation, which the state has not appealed, must be assumed. The issue presented here is analogous to the issue presented in *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990), in which the Court unanimously held that when a state exacts a tax that is later struck down as a violation of the dormant Commerce Clause, the state is constitutionally obligated to refund the taxes collected or prove some other form of retroactive relief. *See also Ashland Oil, Inc. v. Caryl*, No. 88-421 (U.S. June 28, 1990).

Attorney's Fees Awards Act of 1976, Pub.L. 94-559, 90 Stat. 2641, codified as 42 U.S.C. § 1988.[7] However, while the implications of the § 1983 issue for attorney's fees and costs are important,[8] this case itself presents no issue regarding petitioner's entitlement to fees under 42 U.S.C. § 1988 in the event he is held to have a claim under § 1983. That is so because the Nebraska Supreme Court expressly recognized that petitioner would be entitled to attorney's fees and costs under § 1988 if he had stated a cognizable claim under § 1983 even if relief were actually granted on other grounds. Thus, it stated: "[A] party who prevails on a ground other than § 1983 is entitled

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[7] Section 1983 is not available to obtain damages in this case because *Will v. Michigan Department of State Police*, 109 S. Ct. 2304 (1989), held that neither states nor state officials sued for monetary relief in their official capacities were "persons" subject to suit under § 1983 and because petitioner has not sought damages from respondents in their individual capacities, which would require a showing of bad faith on their part in the enforcement of the challenged tax statutes. Nor was § 1983 needed for injunctive relief, since such relief was available under state law. Injunctive relief under § 1983 was clearly available, however, because, as *Will* and other cases have made clear, state officials sued in their official capacities for injunctive relief are persons subject to suit under § 1983. *See* 109 S. Ct. at 2311, n.10.

[8] As discussed more fully in the Petition For a Writ of Certiorari at 13-15, the ability of litigants like petitioner to recover attorney's fees and litigation costs under 42 U.S.C. § 1988 is extremely important and in some cases essential to effectively protecting the rights of individuals and the interests of the public in the free flow of interstate commerce. In a case such as this one, where a discriminatory state tax imposes costs on individual taxpayers which would not justify the expense of a separate lawsuit, the ability to recover fees and costs from the taxing authority will often provide the only practical means for challenging the tax.

to attorney fees under § 1988 if § 1983 would have been an appropriate basis for relief." (Pet. App. 5a, citing cases). *See also Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980); *Maine v. Thiboutot*, 448 U.S. at 10-11.[9]

With respect to the single issue presented here, petitioner submits that the decision below erred in concluding that state violations of the Commerce Clause are not cognizable under § 1983. As discussed in the arguments that follow, this Court's decisions establish that § 1983 is to be broadly construed to provide redress for deprivations of *all* constitutional and federal statutory rights, and Congress has not chosen to cut back those decisions by restricting § 1983 to some subset of rights. Furthermore, the Court has consistently held that the Commerce Clause gives rise to personal, enforceable rights; the contrary conclusion of the Nebraska Supreme Court is at odds with almost two centuries of Commerce Clause decisions. Finally, the conclusion of the decision below that constitutional provisions allocating governmental powers may not also create rights in individuals which they may enforce is (1) inconsistent with the test this Court has established for determining what are "rights" enforceable under § 1983, (2) unworkable, (3) contrary to many decisions upholding individual rights based on power allocating provisions, and

[9] Accordingly, this case does not involve the issues presented in *Oregon State Police Officers Association v. Oregon*, 766 P.2d 408 (Or. Ct. App. 1988), *petition for cert. filed*, 58 U.S.L.W. 3727 (U.S. Apr. 11, 1990) (No. 89-1604) and *Gonzales v. New Mexico Educational Retirement Board*, 788 P.2d 348 (N.M.), *petition for cert. filed*, 59 U.S.L.W. 3002 (U.S. June 4, 1990) (No. 89-1892).

(4) wholly unsupported by the legislative history of §§ 1983 and 1988.

I. 42 U.S.C. § 1983 Provides A Remedy For State Deprivations of *All* Constitutional Rights, and Congress Has Not Limited The Broad Scope This Court Has Given To § 1983.

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of any statute . . . of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of *any* rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis supplied).

This Court has "repeatedly held that the coverage of [§ 1983] must be broadly construed." *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989). In accordance with that principle, it has consistently rejected efforts to limit the scope of the rights to which § 1983 applies. For example, in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 (1972), the Court rejected the argument that the phrase "right, privilege, or immunity secured by the Constitution" was intended to apply only to personal rights, not property rights, secured by the Constitution.[10] The Court held that the version of the phrase that appears in 18 U.S.C. § 242 "embrace[s] '*all* of

[10] This phrase is similar to the language that appears in § 1983. It is part of 28 U.S.C. § 1343(3), the jurisdictional counterpart of § 1983, and a similar version also appears in 18 U.S.C. § 242. *Lynch* specifically involved an interpretation of § 1343(3), but the Court, in discussing its broad scope, noted expressly that similar language was employed in § 1983 and in § 1343(3). 405 U.S. at 543, n.7.

the Constitution and laws of the United States.' " *Id.* at 549 n.16 (quoting *United States v. Price*, 383 U.S. 787, 797 (1966) (emphasis in original). Similarly, in *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Court rejected the contention that § 1983 provided redress only for State violations of federal laws pertaining to civil rights or equal protection, and it upheld the respondents' § 1983 claim based on the State's alleged violation of the Social Security Act, as well as their related claim for attorney's fees under § 1988. The Court stated: "Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." *Id.* at 4. Most recently, in *Golden State Transit*, the Court upheld a § 1983 cause of action based on the claim that a city's action was preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 110 S. Ct. at 451-452.

The decision below is distinctly at odds with this Court's broad view of the scope of § 1983. In effect it seeks to carve an exception out of § 1983 similar to those rejected in *Lynch, Thibotout* and other cases—*i.e.*, an exception for certain types of constitutional violations.

There is no warrant for such a judicial rewriting of § 1983. If Congress disagreed with this Court's broad and unqualified view of § 1983 or wished to limit the scope of § 1983 to some subset of constitutional or statutory rights or to limit the types of claims for which attorney's fees are available under § 1988, it has had ample opportunity over the past several decades to revise those statutes accordingly. In fact, the only change Congress has made to § 1983

since its original enactment was to *broaden* the scope of the statute when, in 1979, it amended § 1983 to encompass actions under color of the statutes, ordinances, etc. of the District of Columbia as well as those of the states and territories. Pub. L. 96-170, 93 Stat. 1284 (1979).[11] The fact that it has chosen not to restrict in any way this Court's broad construction of § 1983 militates strongly against fashioning judicial exceptions to the scope of the statute. As this Court said in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977): "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." For that reason, this Court has consistently declined to change long-standing statutory constructions, and it should decline to do so here. *See, e.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 58 U.S.L.W. 4862 (1990); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986).

II. This Court's Decisions Have Consistently Recognized That The Commerce Clause Secures Personal, Enforceable Rights.

The conclusion of the Nebraska Supreme Court that the Commerce Clause does not secure individual constitutional rights is also squarely in conflict with numerous decisions of this Court. Like the other courts that have reached the same conclusion, the Nebraska Supreme Court followed and relied primarily on the

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[11] This amendment was enacted to overrule this Court's decision in *District of Columbia v. Carter*, 409 U.S. 418, 419 (1973), which held that the District of Columbia was not a "State or Territory" within the meaning of § 1983. H.R. Rep. No. 548, 96th Cong., 1st Sess. 2 (1979).

reasoning of the Eighth Circuit in *Consolidated Freightways Corp. v. Kassel*, which rejected Consolidated Freightways's claim against Iowa under §§ 1983 and 1988 after this Court struck down an Iowa statute limiting truck lengths as a violation of the Commerce Clause.[12] The Eighth Circuit reasoned:

> [T]he Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments.
>
> • • •
>
> It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and state interests, not the protection of individual rights.
>
> • • •
>
> Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of § 1983.

730 F.2d at 1144, 1145. The same sentiment is echoed in other decisions that have followed *Kassel*. *See, e.g., J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985) ("[T]he Commerce Clause deals with the relationship between national and state interests, and does not deal with the protection of individual rights."); *Kraft v. Jacka*, 872 F.2d 862, 869 (9th Cir. 1989).

[12] *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

The fallacy in the view expressed in the foregoing decisions is the assumption that constitutional provisions can serve only one function—that they either allocate power or secure individual rights, but cannot do both. In fact, as will be shown, this Court's decisions make clear that many constitutional provisions, including the Commerce Clause, serve both functions, and that provisions allocating powers among governmental entities normally do so *in order* to secure individual rights and liberties.

Contrary to the views expressed in *Kassel*, this Court's Commerce Clause decisions leave no doubt that that Clause not only restricts the power of the States over interstate commerce but also creates a right in individuals to engage in interstate commerce free of discriminatory and protectionist state taxation and regulation. As discussed more fully at pp. 22-26, *infra*, this Court's decisions have regarded as a personal "right" any legal protection, privilege or immunity that an individual is permitted (*i.e.*, has standing) to enforce through the processes of the courts. At least since it entertained Mr. Gibbons's Commerce Clause defense against Mr. Ogden's attempt to enforce his New York state-granted monopoly over Hudson River navigation,[13] this Court has not only recognized the ability of individuals to enforce personal protections based on the Commerce Clause through the judicial process but also has spe-

[13] *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824).

cifically *described* the Commerce Clause has having secured personal rights.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977), for example, the Court held that certain stock exchanges had standing to challenge a New York tax that discriminated against them and their members, stating (emphasis supplied): "The Exchanges are asserting *their right under the Commerce Clause* to engage in interstate commerce free of discriminatory taxes on their business . . . ." Similarly, in *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), the Court stated: "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Western Union Tel. Co. v. State of Kansas*, 216 U.S. 1, 30 S. Ct. 190, 54 L.Ed. 355." In these and many other cases, the Court has used and understood the term "right" to mean any legal privilege or protection which a person may enforce by judicial action.

The personal nature of the rights secured by the Commerce Clause is perhaps most dramatically illustrated by this Court's landmark civil rights decisions which struck down racially discriminatory state laws as violations of the Commerce Clause. In *Morgan v. Virginia*, 328 U.S. 373 (1946), the Court upheld an individual bus passenger's Commerce Clause challenge to a Virginia statute requiring racial segregation on interstate buses. Significantly, the Court rejected a challenge to the passenger's standing to invoke the Commerce Clause; the Court stated:

> We think . . . that the appellant is a proper person to challenge the validity of this statute as a burden on commerce . . . . *Constitutional protection against burdens on commerce is for her benefit* on a criminal trial for violation of the challenged statute.

Id. at 376-377 (emphasis supplied, footnote omitted). *Accord, Bailey v. Patterson*, 369 U.S. 31 (1962). *See also Edwards v. California*, 314 U.S. 160 (1941), and *United States v. Guest*, 383 U.S. 745, 757-760 (1966), recognizing a "constitutional right to travel from one State to another" based on the Commerce Clause.[14] Although they were cited to it, the Nebraska Supreme Court made no reference in its opinion to the foregoing decisions of this Court, and its ruling that the Commerce Clause does not secure personal rights simply cannot be reconciled with them.[15]

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[14]Very recently this Court again showed that the Commerce Clause does more than merely allocate power among state and federal governments and that it also secures tangible, enforceable rights in individuals. In *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990), the Court unanimously held that when a State exacts a discriminatory tax that is later struck down as in violation of the Commerce Clause, the taxpayers are entitled to retroactive relief, either in the form of refunds of the taxes collected or in any other way that can effectively remedy the discrimination to which the taxpayers was subjected.

[15] In *Consolidated Freightways Corp. v. Kassel*, the Eighth Circuit dismissed some of the cited statements—those in *Garrity v. New Jersey* and *Western Union Tel. Co. v. Kansas*—as either "mere dictum" or as "not dealing with the question of whether the Commerce Clause secures rights within the meaning of 1983." 730 F.2d at 1145. However, neither the Eighth Circuit nor any other decision following *Kassel* discussed *Boston Stock Exchange v. State Tax Commission*, *Morgan v. Virginia*, *Bailey v. Patterson*, *Edwards v. California*, or *United States v. Guest*, in all of which the recognition of personal rights under the

It is true that the Commerce Clause grants power to Congress and restricts the powers of the states, but in doing so it also provides important protections to individuals which they have been able to enforce through the courts—protections which this Court has therefore naturally and consistently described as "rights" under the Commerce Clause. These rights are as fundamental to our constitutional system as any secured by the Constitution. To deny them would, in the words of Justice Cardozo, "invite a speedy end of our national solidarity." *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 523 (1935). To individuals such as petitioner, moreover, his right to conduct his trucking business among the states free from discriminatory state taxes or other laws is as important as any other right the Constitution secures to him, since his very livelihood depends on it.

III. Whether A Constitutional Or Statutory Provision Establishes A "Right" That Is Enforceable Under § 1983 Does Not Turn On Whether The Provision Allocates Governmental Powers.

1. The Test Employed In The Decision Below Is Inconsistent With The Test This Court Has Fashioned For Determining What Constitutes "Rights" Enforceable Under § 1983.

There is no merit to the notion, employed by the Eighth Circuit in *Kassel* and adopted by the court below, that a constitutional provision like the Commerce Clause does not secure personal "rights" be-

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Commerce Clause was clearly not dictum. Moreover, the fact that the Court's recognition of such rights was not specifically in connection with § 1983 is plainly immaterial. There is no rational basis for concluding that the Commerce Clause secures "rights" for some purposes but not for purposes of § 1983.

cause it merely allocates governmental powers. As discussed *infra* at 26-29, such a notion is refuted by many decisions of this Court that have upheld individual rights on the basis of similar "power-allocating" provisions, and it would embark the courts on a fruitless mission of trying to fashion distinctions among constitutional provisions that are ultimately unworkable. Specifically with respect to § 1983, moreover, the notion is inconsistent with the test this Court has fashioned for determining what constitutes "rights" that are enforceable under § 1983.

Whether or not a constitutional or statutory provision secures a "right" within the meaning of § 1983 is not an issue that is new to this Court. The Court has addressed this precise issue in a number of decisions, which it recently reviewed in *Golden State Transit Corp. v. City of Los Angeles* and summarized as follows:

> A determination that § 1983 is available to remedy a statutory or constitutional violation involves a two-step inquiry. First, the plaintiff must assert the violation of a federal right. *See Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 19 (1981). Section 1983 speaks in terms of "rights, privileges, or immunities," not violations of federal law. In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981).

> The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-432 (1987). We have also asked whether the provision in question was "inten[ded] to benefit" the putative plaintiff. *Id.*, at 430; *see also id.*, at 433 (O'Connor, J., dissenting) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

110 S. Ct. at 448.[16]

Golden State Transit and the other decisions cited therein reflect the view that the question whether a provision establishes an individual right is essentially the same question as whether it creates a protection, privilege or immunity that is judicially enforceable by that individual. That question, in turn, embraces two subsidiary questions: first, whether the provision in question imposes specific obligations on the governmental unit as opposed to merely stating precatory exhortations or general preferences, and second, whether the individual has standing to invoke the provision in question.

Under the formulation set forth in *Golden State Transit* there can be no serious doubt that the Commerce Clause secures rights within the meaning of § 1983. It has been a fundamental precept of constitutional jurisprudence since *Cooley v. Board of Port Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851), that the Commerce Clause imposes specific obligations on the States.[17] These obligations include, among other things, refraining from discriminating in their taxing systems against interstate commerce and out-of-state businesses. *See, e.g., Guy v. Baltimore*, 100 U.S. 434 (1879) (striking down city wharfage fee imposed only on ships carrying out-of-state goods). Furthermore, the interests asserted by those who have invoked the protection of Commerce Clause are obviously not so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce," since the courts have consistently enforced them throughout the history of the United States.[18]

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[16] The Court went on to explain that the second step of the inquiry was whether Congress " 'specifically foreclosed a remedy under § 1983.' " 110 S. Ct. at 448 (quoting *Smith v. Robinson*, 468 U.S. 992, 1005, n.9 (1984)). This part of the inquiry is not pertinent to this case. Respondents have never suggested that Congress by statute has foreclosed a § 1983 remedy for Commerce Clause violations, and there would be no basis for such a claim.

[17] As the Court said in *A&P Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976): "[A]t least since *Cooley v. Board of Wardens*, 12 How. 299 (1852), it has been clear that 'the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' " (Quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946)).

[18] The fact that the Commerce Clause itself does not expressly state or describe the obligations and restraints it imposes on the States is not material. As the Court stated in *Golden State Transit:* "A rule of law that is the product of judicial interpretation of a vague, ambiguous or incomplete statutory provision is no less binding than a rule that is based on the plain meaning of a statute. The violation of a federal right that has been found to be implicit in a statute's language and structure is as much

It is also well settled that individuals injured by state violations of those obligations have standing to enforce those obligations in court. Such standing has not only been implicit in all dormant Commerce Clause actions successfully brought by businesses and individuals; this Court expressly affirmed it in *Boston Stock Exchange v. State Tax Commission* when it rejected a challenge to the standing of the plaintiff exchanges to contest the taxes at issue and stated that "the Exchanges have standing under the two-part test of *Data Processing Service v. Camp*, 397 U.S. 150 (1970). . . . The Exchanges are asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business. . . ." 429 U.S. at 320 n.3. Indeed it was a contradiction in terms for the Nebraska courts to uphold petitioner's standing to seek declaratory and injunctive relief against Nebraska's retaliatory tax and to uphold his claim under the Commerce Clause on the merits and issue the requested relief, and yet to conclude that the Commerce Clause secured no rights to petitioner. How can a person have standing to assert and obtain relief with respect to rights he does not possess?

2. A Test For Rights Based On Power Allocation Would Be Unworkable And Contrary To Many Decisions Upholding Individual Rights Based On Power Allocating Provisions.

Furthermore, contrary to the conclusion of the court below and other courts that have adopted the Eighth Circuit's rationale in *Kassel*, whether or not a constitutional provision allocates power among governmental entities is neither a rational nor a workable basis for determining whether that provision secures individual "rights" for purposes of § 1983 or for any other purpose. Indeed this Court has specifically rejected such a basis for determining individual rights in several cases, most recently in *United States v. Munoz-Flores*, 58 U.S.L.W. 4563 (1990). In that case a criminal defendant challenged the fine imposed on him on the ground that the statute authorizing the fine was a revenue measure which originated in the Senate in violation of the Origination Clause of Article I, § 7, which requires all revenue bills to originate in the House of Representatives. The Government argued, among other things, that the defendant had no claim because the Origination Clause merely allocates powers among the houses of Congress and thus "does not involve individual rights." *Id.* at 4566. The Court rejected this argument, stating:

> [T]he Government's claim that compliance with the Origination Clause is irrelevant to ensuring individual rights is in error. This Court has repeatedly emphasized that " 'the Constitution diffuses power the better to secure liberty.' " *Morrison* [*v. Olson*, 487 U.S. 654], *supra*, at 694 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). *See also Morrison, supra*, at 697 (Scalia, J., dissenting) ("The Framers of the Federal Constitution . . . viewed the principle of separation of powers as the absolutely central guarantee of a just government"). Recognizing this, the

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a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute." 110 S. Ct. at 451.

> Court has repeatedly adjudicated separation of powers claims brought by people acting in their individual capacities.

Id. (citation omitted).

Similarly, in *Davis v. Michigan Department of Treasury*, 109 S. Ct. 1500 (1989), the Court expressly rejected the contention that constitutional provisions allocating power between the state and federal governments cannot also give rise to personal constitutional rights. In that case, the State argued that a taxpayer could not seek a tax refund on the basis of the doctrine of intergovernmental tax immunity because the asserted purpose of the doctrine was "to protect governments and not private entities or individuals." *Id.* at 1507. In holding that an individual *could* maintain such a claim, the Court stated:

> It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary.

Id. (citations omitted).

As the Court noted in *Munoz-Flores* and *Davis*, the notion that power allocating provisions cannot create individual rights is contrary to many other decisions of this Court that have found and enforced individual rights based on constitutional provisions and doctrines that allocate governmental powers or otherwise deal

with the structure of government. In addition to those enforcing rights under the Commerce Clause discussed *supra* at 20-22, these include, for example, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), in which the Court upheld the claim of a government employee that the Gramm-Rudman-Hollings Act, Pub. L. 99-177, 99 Stat. 1038, violated the separation of powers doctrine because it gave Congress power to remove the executive officer charged with administering the Act and would therefore unconstitutionally deprive the plaintiff of his right to a scheduled salary increase. Similarly, in *INS v. Chadha*, 462 U.S. 919, 951 (1983), the Court upheld the right of an individual not to be deported pursuant to a one-house veto provision in a statute that the Court held to contravene the President's constitutional role in legislation and the principle of bicameralism. In *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), the Court sustained the claim of a litigant that the Bankruptcy Act of 1978, Pub. L. 95-598, 92 Stat. 2549, violated the requirements of Article III because bankruptcy judges appointed under the Act exercised judicial power without life tenure. All of these decisions refute the conclusion of the Supreme Court of Nebraska that the Commerce Clause does not secure individual rights because it allocates powers among the state and federal governments.

Finally, the test for individual rights employed by the court below, if adopted, would embark the courts on an exercise very similar to the one this Court noted and disapproved in *Lynch v. Household Finance*, when it rejected the contention, adopted by some courts, that the phrase "any right, privilege or immunity secured by the Constitution" appearing in

28 U.S.C. § 1343(3) applied only to "personal rights" and not to "property rights." The Court aptly observed:

> A final, compelling reason for rejecting a "personal liberties" limitation upon § 1343(3) is the virtual impossibility of applying it. The federal courts have been particularly bedeviled by "mixed" cases in which both personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity.

405 U.S. at 550-551 (footnotes omitted).

The same would surely be true if the courts were required to draw distinctions among constitutional provisions based on whether or not they allocated governmental powers. Such a distinction, if accepted, could plausibly be argued to deny individuals' rights based on a host of constitutional provisions, including, for example, all of the powers of Congress in Article I, Section 8, and all of the restrictions in Article I, Section 10 upon states, such as those prohibiting bills of attainder, *ex post facto* laws, laws impairing contracts, and duties on exports and imports. It could even be argued to preclude a determination of personal rights based on the First and Fourteenth Amendments because they are phased in terms of limitations on the powers of Congress and the states. As this Court has held, however, there is no principled basis for such a distinction, and many power allocating provisions, including the Commerce Clause, have been held also to secure individual rights.

In reaching the contrary conclusion, the court below and the Eighth Circuit in *Kassel* erroneously analogized the Commerce Clause to the Supremacy Clause. The Supremacy Clause, however, is very different from the Commerce Clause, and indeed, from any other provision of the federal Constitution. The Supremacy Clause is merely a declaration of the supremacy of the federal Constitution and federal laws over state laws; as this Court noted in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 613 (1979), it is not itself "a source of any federal rights." *See also Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. at 449.[19] The Commerce Clause, in contrast, clearly *is* a "source of . . . federal rights" which individuals may enforce, and in that respect it is no different from the Ex Post Facto Clause or the Bill of Attainder Clause or any other substantive limitation on the power of states contained in the Constitution. Since those are all limitations that individuals may personally enforce by judicial action, each of those clauses can only be regarded as establishing personal constitutional "rights."

3. The Legislative History of § 1983 Does Not Support The View That The Commerce Clause Does Not Create Rights Enforceable Under § 1983.

Although the decision below did not discuss or rely on the legislative history of § 1983, the Eighth Circuit

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[19] As *Golden State Transit* demonstrates, however, whether or not the Supremacy Clause itself secures "rights" enforceable under 1983 is largely inconsequential, because the Supremacy Clause is pertinent only when a claimant invokes some other federal constitutional or statutory provision as assertedly superior to some state law. When those other provisions are found to establish enforceable rights, as the National Labor Relations Act was found to do in *Golden State Transit*, it is irrelevant whether the Supremacy Clause also secures such rights.

in *Kassel* concluded that that history supported its view that § 1983 was not intended to provide redress for state violations of the Commerce Clause. The Eighth Circuit concluded that the history of § 1983 showed Congress intended that "the type of rights protected by § 1983 are 'important personal rights akin to fundamental rights protected by the Fourteenth Amendment.' " 730 F.2d at 1146 (quoting *First National Bank of Omaha v. Marquette National Bank of Minneapolis*, 636 F.2d 195, 198 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981)). The Eighth Circuit also cited some floor remarks of Rep. Shellabarger, a leading proponent of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, a portion of which is now codified as § 1983, which seem to distinguish between constitutional provisions which "relate to the divisions of the political powers of the State and General Governments" and those which "relate directly to the rights of persons within the States and as between the States and such persons therein." 730 F.2d at 1146 n.16 (quoting Cong. Globe, 42d Cong., 1st Sess., App. 69 (1871)).

The Eighth Circuit's view of the history and purpose of § 1983 as it relates to Commerce Clause violations is incorrect for several reasons. First, as discussed earlier, the Commerce Clause does secure "important personal rights akin to fundamental rights protected by the Fourteenth Amendment." *Morgan v. Virginia* and other cases cited at pp. 20-21, *supra*, establish as much. Establishing the right of Americans to travel and conduct business throughout the United States free from burdensome and protectionist state laws was one of the chief purposes of the Constitution, and it is as fundamental as any of the liberties the Constitution secures to us.

Second, this Court in *Lynch v. Household Finance* and *Maine v. Thiboutot* squarely rejected the notion that Congress intended to limit § 1983 to some subset of constitutional or statutory rights—*e.g.*, "important" rights, or rights "akin" to those protected by the Fourteenth Amendment. Those decisions and others have thoroughly reviewed the legislative history of § 1983 and related provisions and have concluded that that history provides no basis for limiting § 1983 to some subset of rights but instead fully supports a broad construction consistent with the unqualified language of the statute. *See Maine v. Thiboutot*, 448 U.S. at 6-8; *Lynch v. Household Finance Corp.*, 405 U.S. at 543-550; *United States v. Price*, 383 U.S. 787, 801-807 (1966).

Finally, Rep. Shellabarger's remarks do not warrant a contrary conclusion. First, the quoted remarks do not appear to have been expressing any view concerning the scope of the bill that became § 1983. Second, those remarks make no reference to the Commerce Clause, and there is no basis for the Eighth Circuit's speculation that Rep. Shellabarger would not have classified personal rights under the dormant Commerce Clause as falling within "the rights of persons within the States and as between the States and such persons therein." Third, even if Rep. Shellabarger's remarks did reflect the view that § 1983 does not encompass all provisions of the Constitution or that provisions relating to the division of governmental powers do not establish personal rights, the language of the statute as enacted and this Court's consistent decisions are to the contrary. At best, Rep.

Shellabarger's comments represent a "fragment[ ] of legislative history" which hardly amounts to "a clearly expressed legislative intent contrary to the plain language of the statute." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) (citation omitted). *See also Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), declining to give weight to the "isolated remark" of the sponsor of legislation.

In sum, the legislative history of 1983 does not support the decision below.

CONCLUSION

The judgment of the Supreme Court of Nebraska should be reversed.

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July 13, 1990

QUESTION PRESENTED

Whether there is a cause of action under 42 U.S.C. § 1983 for violations of the dormant Commerce Clause.

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No. 89-1555

In The

Supreme Court of the United States

October Term, 1990

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, et al.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Nebraska

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is a civil action in which Petitioner Mark E. Dennis, doing business as Dennis Trucking,[1] sued the State of

[1] The original petition in state court was brought in the name of the Private Truck Council of America, Inc. ("PTCA"), and Dennis Trucking (J.A. 5). The trial court dismissed PTCA as a plaintiff for lack of standing (Pet. Cert. App. 33a). A second amended petition was subsequently filed naming as plaintiff Mark E. Dennis, doing business as Dennis Trucking (J.A. 110).

Nebraska[2] and various state officials[3] to obtain a judgment declaring certain taxes imposed on motor carriers pursuant to Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984)[4] to be unconstitutional and enjoining the Respondents from assessing or collecting such taxes (J.A. 110-116). Dennis alleged that the "retaliatory" taxes[5] imposed under §§ 60-305.02 and 60-305.03 were an unlawful burden on interstate commerce in violation of U.S. Const. art. I, § 8, cl.

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[2] The State of Nebraska, while named as a party in all proceedings below, was not designated as a party in this Court by petitioner (Pet. Cert. App. 1a, 28a, 31a; J.A. 110, 138, 142).

[3] Respondents Margaret L. Higgins, Director, Nebraska Department of Motor Vehicles, Gerald Strobel, Director, Nebraska Department of Roads, and Frank Marsh, Nebraska State Treasurer, are successors in office to other officials sued by Petitioner named in both their individual and official capacities (J.A. 110).

[4] The provisions of §§ 60-305.02 and 60-305.03 have since been amended by 1988 Neb. Laws, LB 1004, §§ 1 and 2 (*codified at* Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1988)).

[5] The taxes formerly imposed under §§ 60-305.02 and 60-305.03 are referred to as "retaliatory" because they were imposed on carriers operating vehicles in Nebraska that were registered in certain states that levied so-called "third structure taxes" on Nebraska-registered trucks operated in those states. "Third structure taxes" are so named because they are assessed in addition to registration fees and fuel taxes (commonly referred to as "first" and "second structure" taxes). Thus, former §§ 60-305.02 and 60-305.03 were implemented by imposing retaliatory taxes on vehicles registered in nine states (Arizona, Arkansas, Idaho, Nevada, New York, Ohio, Oregon, Pennsylvania, and Wyoming), and these taxes mirrored exactly the third structure tax that each of those states assessed on a Nebraska-registered vehicle traveling within its jurisdiction (J.A. 142). Petitioner, a motor carrier operating in interstate commerce with one tractor and two trailers registered pursuant to the laws of Ohio, was thus required to remit to Nebraska the two cent per mile third structure tax imposed on Nebraska-registered vehicles of this nature operating in Ohio (J.A. 149, 150). Between June 1, 1983, and November 17, 1984, petitioner paid a total of $52.60 in taxes to Nebraska pursuant to §§ 60-305.02 and 60-305.03 (J.A. 150).

3; constituted a denial of the petitioner's privileges and immunities in violation of U.S. Const. art. IV, § 2, cl. 1; constituted a grant by the Nebraska Legislature of special and exclusive privileges, immunities, and franchises in violation of Neb. Const. art. III, § 18; and violated 42 U.S.C. § 1983 (1982) by depriving petitioner of rights secured by the U.S. Constitution (J.A. 114-116).

Following a trial on stipulated facts, the state district court held that the challenged statutes violated the dormant Commerce Clause, and the court permanently enjoined Respondents from assessing, levying, or collecting the taxes or fees imposed pursuant to §§ 60-305.02 and 60-305.03 (Pet. Cert. App. 29a, 30a). The trial court dismissed the remaining counts, holding that Dennis failed to prove he was entitled to judgment under U.S. Const. art. IV, § 2, cl. 1; Neb. Const. art. III, § 18; or 42 U.S.C. § 1983 (*id.* at 30a). The trial court's order also provided that Dennis and his attorneys were "entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees" (*id.*). Dennis filed a motion for new trial, asserting that the common fund from which such expenses and fees were to be paid was the total amount of taxes available for refund pursuant to the court's order, but the court overruled this motion (*id.* at 4a).

Dennis appealed, contending that the district court erred in denying his claims under 42 U.S.C. § 1983, in dismissing his claim under U.S. Const. art. IV, § 2, cl. 1, and in denying his claim regarding the composition of the common fund. Respondents cross-appealed the trial court's finding that Dennis and his attorneys were entitled to payment of their expenses and fees under the Equitable Fund Doctrine (*id.*).[6] On February 16, 1990, the Nebraska Supreme Court affirmed the trial court's determination that Dennis' claim for violation

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[6] Respondents did not appeal the trial court's finding that the challenged statutes violated the dormant Commerce Clause (Pet. Cert. App. 4a).

of the dormant Commerce Clause did not state a cause of action under 42 U.S.C. § 1983. In addition, the Nebraska Supreme Court affirmed the district court's dismissal of Dennis' claim under U.S. Const. art. IV, § 2, cl. 1, and reversed the district court's holding that Dennis and his attorneys were entitled to expenses and fees under the Equitable Fund Doctrine (Pet. Cert. App. 1a-27a).[7]

SUMMARY OF ARGUMENT

A. The Nebraska Supreme Court correctly held that a claim for violation of the dormant Commerce Clause does not establish a cause of action under 42 U.S.C. § 1983, because such a claim does not involve the deprivation of "any rights, privileges, or immunities secured by the Constitution."

1. In *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444, 448 (1989), this Court held that a party seeking relief under § 1983 "must assert the violation of a federal right." The Court pointed out that "violations of federal law" do not necessarily involve the deprivation of federal "rights." *Id.* Under *Golden State*, the governing standard for determining whether a constitutional "right" has been violated, for purposes of § 1983, is whether the constitutional provision in question is intended to confer specific and definite benefits on the plaintiff that are binding obligations of a state governmental unit and are within the competence of the judiciary to enforce. *Id.* at 448, 449.

2. The dormant Commerce Clause does not secure any constitutional "right" to private market participants, such as Petitioner Dennis, within the meaning of § 1983. The original and continuing purpose of the Commerce Clause is to "distribut[e] . . . power between the national and state

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[7] Dennis did not seek review in this Court of the Nebraska Supreme Court's determinations with respect to U.S. Const. art. IV, § 2, cl. 1, and the Equitable Fund Doctrine.

governments,"[8] by establishing federal supremacy in the regulation of interstate commerce, so that the national interests in political and economic union can be preserved.[9] Thus, the Commerce Clause is closely analogous to the Supremacy Clause in affirming the priority of valid exercises of federal power over conflicting state rules in the commercial arena. Because its essential function is to allocate federal and state powers, the Commerce Clause does not create constitutional "rights" that are enforceable under § 1983 any more than the Supremacy Clause does. *See Golden State*, 110 S.Ct. at 449, 450.

This Court has recognized that the Commerce Clause "protects the interstate market, *not particular interstate firms*, from prohibitive or burdensome regulations."[10] Individual participants in the interstate market receive only indirect and incidental benefits from the Commerce Clause's restraints on state action. In addition, even these secondary benefits can be qualified or removed by legislation adopted either by Congress itself or by the states acting pursuant to congressional authority. Thus, the dormant Commerce Clause does not protect any "right" in the sense contemplated by § 1983, because it does not provide a specific and definite "guarantee of freedom for private conduct that the State may not abridge." *Golden State*, 110 S.Ct. at 452.

Dennis' mere standing to bring a federal claim under the dormant Commerce Clause is not equivalent to a "right" cognizable under § 1983. In cases decided soon after the enactment of § 1983, this Court held that § 1983's reference to "rights . . . secured by the Constitution" has a much narrower scope than the federal question jurisdiction granted

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[8] *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945).

[9] *E.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-39 (1949).

[10] *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (emphasis added).

by 28 U.S.C. § 1331 over "all civil actions arising under the Constitution."[11] Moreover, in contrast to the standard for defining "rights" under § 1983, which requires evidence of a constitutional purpose to confer specific and definite benefits on the plaintiff, the lenient test for federal standing can be satisfied even if there is *no* evidence of an intent to benefit the plaintiff.[12] Dennis does not have any guaranteed individual entitlement to engage in interstate commerce, and his indirect or derivative standing to assert the national interests protected by the Commerce Clause falls far short of an individual "right" protected by § 1983.

The legislative history of § 1983 confirms that the dormant Commerce Clause does not create any "right" cognizable under § 1983. Proponents of the statute drew a clear distinction between constitutional provisions guaranteeing individual rights, which would be enforced under § 1983, and provisions allocating powers between the federal and state governments, which would not be altered by the statute. Thus, while § 1983 was enacted to ensure "the protection of personal liberties and civil rights," it was *not* intended to affect "[t]he protection of commerce" that already existed under the Commerce Clause.[13]

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[11] *E.g.*, *Bowman v. Chicago & Northwestern Ry.*, 115 U.S. 611 (1885) (plaintiffs' allegation that a state statute interfered with their "right" to ship goods in interstate commerce might have stated a claim "arising under" the Constitution, but it did not show the deprivation of any "right . . . secured by" the Constitution).

[12] *Golden State*, 110 S.Ct. at 448, 449; *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396, 399-400 (1987) (federal test for standing is satisfied if the plaintiff is "arguably within the zone of interests to be protected by the statute or constitutional guarantee in question"; thus, "there need be no indication of congressional purpose to benefit the would-be plaintiff").

[13] Cong. Globe, 42d Cong., 1st Sess. 333 (1871) (remarks of Rep. Hoar).

3. The extension of § 1983 to dormant Commerce Clause claims would not further the purposes of the statute and would seriously prejudice the interests of state and local governments. Claims under the dormant Commerce Clause, unlike claims brought to redress violations of individual constitutional rights, are generally economic in nature and typically involve disputes between business interests and government entities and officials over taxes or regulatory actions. For over 150 years, market participants in interstate commerce have had adequate incentives and opportunities to litigate Commerce Clause claims. The only practical reason for bringing such claims under § 1983 would be to enhance the availability of damages and to secure attorneys fees under § 1988.

Redefining claims for violations of the dormant Commerce Clause as vindications of constitutional "rights" triggering potential damage awards and virtually automatic awards of attorneys fees under §§ 1983 and 1988 would undoubtedly multiply such litigation. A proliferation of Commerce Clause litigation under § 1983 would impose substantial financial burdens on state and local government officials and would likely chill their willingness to adopt innovative policies in areas such as taxation and business regulation. Absent some clear directive from Congress that such an assault on the regulatory interests of state and local governments was intended by §§ 1983 and 1988, the Court should decline to expand § 1983 into the realm of Commerce Clause litigation.

B. If the Court should determine that § 1983 provides a remedy for violations of the dormant Commerce Clause, this action should be remanded to allow the Nebraska state courts to determine whether they must entertain a claim under § 1983 in a challenge to a state tax. A number of state courts have refused to entertain § 1983 claims in cases involving state taxes.[14] State courts reaching this conclusion have relied

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[14] *See* cases cited *infra* in note 132.

on the federal statutory and judicial policy limiting federal court jurisdiction in actions involving state taxes, as set forth in the Tax Injunction Act,[15] and the Court's decision in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*,[16] holding that challenges to state taxes may not be brought in federal court where an adequate state court remedy is available. This Court has recently recognized that the issue of whether state courts *must* assume jurisdiction under § 1983 in challenges to the imposition of state taxes is "not entirely clear." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987).

Because the court below held that dormant Commerce Clause claims do not establish a cause of action under § 1983, there was no need or occasion for that court to consider whether, if such a claim were cognizable, that court was required to entertain the § 1983 claim in this case involving a challenge to a state tax. In *Ragland*, this Court deemed it appropriate to remand the issue of whether a state court must entertain a § 1983 claim in a state tax action for initial determination by the state courts. 481 U.S. at 233-34. Accordingly, Respondents request this Court, if it should hold that the courts below erred in finding that a violation of the dormant Commerce Clause does not state a cause of action under § 1983, to remand this case to the courts below for a determination of whether they are required to entertain a § 1983 claim in a challenge to a state tax.

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[15] 28 U.S.C. § 1341 (1982).

[16] 454 U.S. 100 (1981).

ARGUMENT

I. PETITIONER'S CLAIM FOR VIOLATION OF THE DORMANT COMMERCE CLAUSE IS NOT COGNIZABLE UNDER 42 U.S.C. § 1983, BECAUSE THE COMMERCE CLAUSE DOES NOT SECURE ANY "RIGHTS, PRIVILEGES, OR IMMUNITIES" WITHIN THE MEANING OF § 1983.

A. Section 1983 Provides a Remedy Only for Deprivations of "Rights, Privileges, or Immunities" Secured by the Constitution or Federal Laws.

Section 1983 provides a civil remedy for any person who is deprived under color of state law of "any rights, privileges, or immunities secured by the Constitution and laws." In *Golden State*, this Court established a "two-step inquiry" to be followed in determining whether a claimed violation of the Constitution or a federal statute is cognizable under § 1983:

> First, the plaintiff must assert the violation of a federal right. . . . Section 1983 speaks in terms of "rights, privileges, or immunities," not violations of federal law. . . .
>
> Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under § 1983," . . . by providing a "comprehensive enforcement mechanis[m] for protection of a federal right."[17]

The primary issue raised by this case is whether a discriminatory state tax statute that violates the dormant Commerce Clause deprives the affected taxpayers of any "right" secured by the Constitution.[18] In *Golden State*, this Court

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[17] 110 S.Ct. at 448 (citations omitted; brackets in original).

[18] As shown *infra* in Argument, Part II, a secondary issue would be raised, in the event this Court held that dormant Commerce Clause claims are generally cognizable under § 1983, as to whether this case should be remanded to the courts below to permit them to determine whether they must entertain a § 1983 claim in a challenge to a state tax.

stated that the following three factors should be considered in assessing "whether a federal right has been violated" for purposes of § 1983: (1) whether the constitutional or statutory provision in question "creates obligations binding on the governmental unit"; (2) whether the "interest" asserted by plaintiff is so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce"; and (3) whether the provision in question was "inten[ded] to benefit" the plaintiff.[19]

Petitioner Dennis acknowledges that the controlling test for defining federal "rights" under § 1983 is set forth in *Golden State*.[20] However, Dennis commits two serious errors in applying this test. First, Dennis indicates that *all* "constitutional violations" must involve the deprivation of "rights" within the scope of § 1983.[21] This Court expressly rejected such a construction of § 1983 in *Golden State*.[22]

Second, Dennis restates the *Golden State* test for defining "rights" so that it contains *only two* factors: "whether the provision in question imposes specific obligations on the governmental unit," and "whether the individual has standing to invoke the provision in question."[23] This restatement departs significantly from the actual *Golden State* test. In the first place, Dennis completely ignores the *third* factor in *Golden State – viz.*, whether the relevant provision was "inten[ded] to benefit" the plaintiff.[24] Additionally, Dennis recasts the second factor relating to the quality of the plaintiff's "interest" as a simple question of standing. As shown

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[19] 110 S.Ct. at 448 (citations omitted; brackets in original).

[20] Petitioner's Brief ("Pet. Br.") 23-24.

[21] *See* Pet. Br. 8-9, 15-16.

[22] 110 S.Ct. at 448 ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' *not* violations of federal law") (emphasis added).

[23] Pet. Br. 24.

[24] *Golden State*, 110 S.Ct. at 448.

below, mere standing to challenge a constitutional violation is not sufficient by itself to establish a constitutional "right" cognizable under § 1983.[25]

Under this Court's construction of § 1983 in *Golden State* and previous cases, a constitutional or statutory provision establishes "rights" cognizable under § 1983 only if the provision is intended to confer on the plaintiff (or a class in which the plaintiff is a member) specific and definite benefits which the plaintiff can enforce as binding obligations of a state governmental unit and which are within the competence of the courts to enforce.[26] By focusing on whether there is a constitutional or statutory intent to confer specific and enforceable benefits on individual persons, this standard for defining "rights" is consistent with the legislative history of § 1983. Section 1983 was originally adopted as Section 1 of the Civil Rights Act of 1871.[27] The primary focus of the proponents of the 1871 Act was to protect the individual rights guaranteed under the Thirteenth, Fourteenth and Fifteenth Amendments. Congress determined that these individual rights needed to be protected from infringement by private groups (especially the

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[25] *See infra* Argument, Part I(B)(2)(b).

[26] *Golden State*, 110 S.Ct. at 448, 449; *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 423, 432 (1987) (in order to establish "enforceable rights" under § 1983, a statutory provision must confer "specific and definite" benefits on a defined class of persons); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 11, 15, 19 (1981) (in order to create "rights" cognizable under § 1983, a federal statute must be intended to "create substantive rights" that are "enforceable" by a class of beneficiaries).

[27] *See, e.g., Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 664 (1978).

Ku Klux Klan) and from impairment due to official hostility or inaction in the Southern states.[28]

Representative Shellabarger, the leading sponsor of the 1871 Act in the House,[29] stated that Section 1 would provide a federal civil remedy to all persons deprived by state action of "rights to which they are entitled under the Constitution by reason and virtue of their national citizenship."[30] Shellabarger further indicated that the "rights, privileges, or immunities" protected by the 1871 Act would consist of "the personal rights which the Constitution guarantees as between persons in the State and the State itself."[31] Similarly, Representative Bingham, a leading supporter of the 1871 Act, stated that the Act would protect "every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution."[32] Representative Maynard, another supporter

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[28] *See, e.g., United Brotherhood of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 832-38 (1983); *Chapman*, 441 U.S. at 611; *Monroe v. Pape*, 365 U.S. 167, 171-80 (1961); Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1497, 1551-53 (1989); *Developments in the Law-Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1153-56 (1977).

[29] Shellabarger was the chairman of the House select committee that drafted the original version of the 1871 Act. He introduced the legislation in the House and served as House floor manager for the Act. *See Monell*, 436 U.S. at 665; Cong. Globe, 42d Cong., 1st Sess. (1871) (hereinafter "Cong. Globe") at 244, 249, 317.

[30] Cong. Globe, 42d Cong., 1st Sess. (1871) App. (hereinafter "Cong. Globe App.") at 68, *quoted in Monell*, 436 U.S. at 683.

[31] *Id.* at 70 (discussing scope of "rights, privileges, or immunities" protected by original House version of Section 2 of 1871 Act). As discussed *infra* at note 98 and accompanying text, Shellabarger's comments concerning the scope of the "rights, privileges, or immunities" protected under the original House version of Section 2 of the 1871 Act are directly relevant to the interpretation of § 1983.

[32] *Monell*, 436 U.S. at 685 n.45 (quoting Cong. Globe App. 81, and noting that Bingham was the author of Section 1 of the Fourteenth

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of the 1871 Act, agreed that the Act would protect "any of the personal rights which the Constitution guarantees to the citizen."[33]

Thus, the legislative history of the 1871 Act confirms this Court's understanding that a constitutional provision creates "rights" cognizable under § 1983 only if the provision is intended to guarantee specific and definite benefits to the plaintiff that he can enforce as obligations binding on a state governmental unit. As shown below, the dormant Commerce Clause creates no such "rights."

B. The Dormant Commerce Clause Does Not Secure any "Rights, Privileges, or Immunities" within the Meaning of § 1983.

1. The Purpose of the Commerce Clause Is to Allocate Power between the Federal and State Governments in Order to Preserve National Political and Economic Union.

The Nebraska Supreme Court correctly determined that the dormant Commerce Clause "does not establish individual rights against government, but instead allocates power between the state and federal governments."[34] The Commerce Clause contains no reference to any right, privilege, or immunity secured to any person. The provision appears as one of a series of clauses in Article I, § 8 of the Constitution granting

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Amendment). Bingham further indicated that the "privileges and immunities" protected under the 1871 Act would be those "guaranteed by the amended Constitution and expressly enumerated in the Constitution." Cong. Globe App. 84.

[33] Cong. Globe App. 310 (discussing scope of "rights, privileges, or immunities" protected under original House version of Section 2 of the 1871 Act).

[34] Pet. Cert. App. 5a (quoting *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984)).

specified powers to Congress. The Commerce Clause simply states that "[t]he Congress shall have Power . . . To regulate commerce . . . among the Several states."[35]

Thus, by its own terms, the Commerce Clause only grants power to Congress and does not restrict state action or grant rights to any person.[36] However, this Court has long held that the "dormant" Commerce Clause "prohibits States from taking certain actions respecting interstate commerce even absent congressional action."[37] This Court's decisions make clear that the primary effect of the dormant Commerce Clause is to accomplish a "distribution of power between the national and the state governments" regarding the regulation of commerce.[38] Ever since *Cooley v. Board of Wardens*,[39] this Court's applications of the dormant Commerce Clause have sought to balance the power of Congress to regulate interstate commerce against the reserved authority of the states to enact

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[35] U.S. Const. Art. I, § 8, cl. 3. It is noteworthy that Professor Hohfeld classified legal interests as falling into four categories: "rights," "privileges," "immunities," and "powers." While the first three categories are protected under § 1983, "powers" are not. Moreover, Hohfeld pointed out that a "right" is not equivalent to a "power." Hohfeld, *Some Fundamental Legal Concepts Applied to Judicial Reasoning*, 23 Yale L.J. 16, 30, 45 (1913).

[36] *See e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987); *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2344 (1990) (Scalia, J., concurring); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1851).

[37] *CTS Corp.*, 481 U.S. at 87. *See also, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

[38] *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945).

[39] 53 U.S. (12 How.) 299 (1851). *Cooley* is generally recognized as the first statement by this Court of the dormant Commerce Clause doctrine. *See, e.g., CTS*, 481 U.S. at 87; *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 370 (1976); L. Tribe, *American Constitutional Law* § 6-4 at 406-07 (2d ed. 1988).

laws on matters of legitimate local concern, including local tax laws.[40]

This Court's decisions have also affirmed that the fundamental purpose of the dormant Commerce Clause is to preserve national political and economic union.[41] The Commerce Clause was designed to prevent a recurrence of the "economic Balkanization that had plagued relations among . . . the States under the Articles of Confederation."[42] The Founders were convinced that the "drift toward anarchy and commercial warfare between states . . . [had come] 'to threaten at once the

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[40] *Cooley*, 53 U.S. (12 How.) at 318-20; *Welton v. Missouri*, 91 U.S. 275, 281-82 (1876); *Southern Pacific*, 325 U.S. at 767, 768-69 ("there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce. . . . [R]econciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved"); *Cottrell*, 424 U.S. at 371 ("in areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause – where local and national powers are concurrent – the Court in the absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims' "); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328-29 (1977) (recognizing the need to balance the congressional power to regulate interstate commerce and the "national interest in free and open trade," on the one hand, with the "legitimate interest of the individual States in exercising their taxing powers," on the other).

[41] *E.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-35, 537-39 (1949) (the Commerce Clause, and this Court's decisions thereunder, are intended to preserve "the solidarity and prosperity of this Nation" by ensuring that "our economic unit is the Nation"); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (the Commerce Clause was designed to preserve "our national solidarity" and "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"). *See generally* Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43 (1988).

[42] *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

peace and safety of the Union.' "[43] In fact, this Court's early decisions under the Commerce Clause repeatedly invoked the Founders' goals of preventing commercial antagonisms between the states, ensuring a united trade policy with respect to foreign nations, and establishing a secure basis for national political union and economic prosperity.[44]

In short, the primary objective of the Commerce Clause is to ensure national political and economic union by establishing the supremacy of federal control over interstate commerce. The Commerce Clause, therefore, is closely analogous to the Supremacy Clause[45] in defining the respective spheres of federal and state authority under the Constitution. Like the Supremacy Clause, the dormant Commerce Clause protects

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[43] *Hood v. DuMond*, 336 U.S. at 533 (quoting J. Story, *The Constitution*, §§ 259, 260). The commercial disputes among the states during the Confederation period, and the likelihood that these rivalries would lead to a political division of the nation into separate confederations, were a primary factor in convincing the Founders of the need for a strong federal government with control over interstate and foreign commerce. *E.g.*, *The Federalist*, No. 7 (A. Hamilton) at 27, 29-30 (G. Wills ed. 1982) (continued state disputes over commercial regulation would likely lead to "outrages, . . . reprisals and wars"); *id.*, No. 22 (A. Hamilton) at 103-04; *id.*, No. 42 (J. Madison) at 214 (continued state conflicts in commercial regulation "would nourish increasing animosities, and not improbably terminate in serious interruptions of the public tranquility"). James Madison pointed to both the political and economic objectives of the Commerce Clause when he stated that the Clause would "maint[ain] . . . harmony and proper intercourse among the States." *Id.*, No. 41, at 203. *See also* 3 M. Farrand, ed., *The Records of the Federal Convention of 1787*, at 547-48 (1937 rev. ed.) (Madison's draft preface to his notes of the debates in the Constitutional Convention, stating that the "want of a general power over Commerce . . . engendered rival, conflicting and angry regulations" among the states).

[44] *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 223-26 (1824) (Johnson, J.); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827) (opinion for the Court by Marshall, C.J.); *Cooley*, 53 U.S. (12 How.) at 316-17 (opinion for the Court by Curtis, J.).

[45] U.S. Const. art. VI, cl. 2.

federal commercial interests by "according them priority whenever they come in conflict with state law."[46] When Congress exercises its legislative power under the Commerce Clause, that Clause and the Supremacy Clause jointly establish the priority of federal law over conflicting state rules.[47] Similarly, it has been suggested that, when this Court strikes down a state law under the dormant Commerce Clause, the Court has vindicated the supremacy of federal legislative power based on an implicit assumption that Congress would have acted if it wished to authorize the states to interfere with interstate commerce regarding the matter in question.[48]

In *Golden State* this Court unanimously concluded that the Supremacy Clause "does not create rights enforceable under § 1983," because it simply establishes the priority of valid exercises of federal power over conflicting exercises of state power within our constitutional scheme.[49] *Golden State* further held that a preemption claim does not create "rights" cognizable under § 1983 unless the preemptive federal statute *itself*, either "by its terms or as interpreted," establishes such "rights."[50] Thus, when Congress preempts state law by enacting a statute based on its Commerce Clause power, that preemption does *not* create a cause of action under § 1983 *unless* the statute itself confers "rights" on private persons.[51]

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[46] *Golden State*, 110 S.Ct. at 449 (quoting *Chapman*, 441 U.S. at 613).

[47] *E.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 196-97, 210-12, 220-21.

[48] *See, e.g.*, *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2344 (Scalia, J., concurring); *Southern Pacific*, 325 U.S. at 768 (alternative holding); *Welton*, 91 U.S. at 282; Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 3, 5-6, 19-28 (1940).

[49] 110 S.Ct. at 449. *See also id.* at 453-54 (Kennedy, J., dissenting).

[50] *Id.* at 449.

[51] *See id.* at 450 ("when congressional pre-emption benefits particular parties only as an incident of the federal scheme of regulation, a

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Therefore, it would be anomalous to conclude that a preemptive invalidation of state law under the *dormant* Commerce Clause automatically results in the creation of § 1983 "rights" in the face of congressional *silence*.[52]

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private damages remedy under § 1983 may not be available"). *Cf. California v. Sierra Club*, 451 U.S. 287, 292-98 (1981) (River and Harbors Appropriation Act of 1899 "was designed to benefit the public at large" and was not enacted "for the especial benefit of a particular class"; therefore, the Act did not grant any implied "rights" to aggrieved private individuals to obtain a federal remedy for alleged violations of the Act).

[52] Petitioner Dennis and *amicus* American Trucking Associations, Inc. ("ATA") point out (Pet. Br. 25-26 n.18; ATA Br. 6 n.2) that *Golden State* found a cognizable § 1983 "right" based on a judicial interpretation of the National Labor Relations Act ("NLRA") which barred federal or state interference in collective bargaining. *Golden State* concluded that the judicial interpretation created a § 1983 "right" even though the interpretation was "not expressly set forth in the text of the statute." 110 S.Ct. at 451. However, the Court made clear in *Golden State* that this interpretation was based on the NLRA's clear purpose to protect "certain rights of labor and management against governmental interference." *Id.* The interpretation created a "right" cognizable under § 1983 because it "denies either [the federal or state] sovereign the authority to abridge a personal liberty." *Id.* at 452. Thus, the holding in *Golden State* was based upon the Court's identification of a statutory purpose to protect "a personal liberty."

The Court also indicated in *Golden State* that a *different* result under § 1983 might be called for in a case involving a judicial "pre-emption rule" which is simply "designed . . . to answer the question whether state or federal regulations should apply to certain conduct." The Court indicated that such a rule might well fall *outside* the scope of § 1983, because it is not "a guarantee of freedom for private conduct that the State may not abridge." *Id.* at 451-52. As shown *infra* at notes 61-68 and accompanying text, the dormant Commerce Clause functions in much the same way as a "judicial pre-emption rule," and it does not guarantee individual "rights" within the scope of § 1983.

2. The Dormant Commerce Clause Does Not Secure any "Right" to Individual Participants in the Interstate Market Within the Meaning of § 1983.

a. The Commerce Clause Protects the Interstate Market, Not Individual Market Participants.

As this Court's decisions have recognized, the Commerce Clause is designed to protect the general public interest in the proper functioning of the interstate market, rather than the particular economic interests of individual participants in that market. Thus, the Court has declared that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."[53] Similarly, the Court has said that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."[54] Perhaps most telling is the Court's statement that the Commerce Clause "protects interstate commerce" while, in contrast, the Equal Protection Clause of the

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[53] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (upholding Minnesota law banning the sale of milk products in nonreturnable plastic containers, notwithstanding evidence that the law favored in-state pulpwood producers and harmed out-of-state plastics producers); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (sustaining Maryland law prohibiting producers and refiners of gasoline from operating retail service stations within the state, even though the law's impact fell exclusively on out-of-state entities).

[54] *CTS Corp.*, 481 U.S. at 88 (upholding Indiana law regulating corporate takeovers even though the law's burden was claimed to fall primarily on out-of-state bidders); *Exxon*, 437 U.S. at 126.

Fourteenth Amendment "protects persons from unconstitutional discrimination by the States."[55]

This Court has also pointed out that the Commerce Clause does not protect interstate market participants from all state taxes. Rather, the Clause requires only that "[state] revenue measures maintain state boundaries as a neutral factor in economic decisionmaking."[56] Thus, the "adverse economic impact in dollars and cents upon a participant in interstate commerce for crossing a state boundary and thus becoming subject to another State's taxing jurisdiction is neither necessary to establish a Commerce Clause violation . . . *nor sufficient*."[57] In short, the clear purpose of the Commerce Clause is to protect the interstate market *as a whole* from discriminatory state burdens (including discriminatory state taxes), and the particular economic interests of individual market participants are incidental, or even irrelevant, to that objective.

Individual market participants and consumers do receive an indirect and incidental benefit from the fact that the Commerce Clause generally creates "an area of free trade among the several States."[58] As already shown, this benefit is

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[55] *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985).

[56] *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987).

[57] *Id.* at 283-84 n.15 (emphasis added; citations omitted).

[58] *Boston Stock Exchange*, 429 U.S. at 328 (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). *See also id.* at 329. For other decisions recognizing that market producers and consumers receive an indirect and incidental benefit from the "federal free trade unit" created by the Commerce Clause, *see, e.g., Hood v. DuMond*, 336 U.S. at 538-39; *Scheiner*, 483 U.S. at 280-84. The Founders themselves recognized that federal regulation of commerce would benefit producers and consumers by fostering free trade. However, the benefit to these persons was plainly incidental to the Founders' principal purpose of preserving national political and economic union. *See, e.g., The Federalist*, No. 22 (A. Hamilton) at 104 (G. Wills ed. 1982); *id.*, No. 42 (J. Madison) at 214.

entirely incidental to the Clause's basic purpose of preserving national political and economic union. Moreover, this benefit is subject to qualification or removal at the pleasure of Congress and, therefore, is not an individual "right" cognizable under § 1983. For example, Congress may constitutionally decide to prohibit all persons from engaging in a particular line of interstate commerce.[59] In the alternative, Congress may constitutionally authorize the states to enact prohibitory or discriminatory laws affecting a line of interstate commerce.[60] Thus, the only "interest" of an interstate market participant under the dormant Commerce Clause is to conduct his business free from discriminatory state rules, provided that Congress does not prohibit or discriminate against his business and further provided that Congress does not authorize the states to do so. To describe a market participant's "interest" under the Commerce Clause in such equivocal and hedged terms is to demonstrate that the dormant Commerce Clause does not create "rights" within the meaning of § 1983.

In *Golden State*, this Court suggested that a "right" for purposes of § 1983 involves "a guarantee of freedom for private conduct that the State may not abridge."[61] In addition, as shown above, *Golden State* and other decisions demonstrate that an entitlement creates "rights" cognizable under § 1983 only if it is intended to guarantee specific and definite benefits to the plaintiff that he can enforce as obligations binding on a state governmental unit.[62] The dormant Commerce Clause does not create any "rights" under § 1983, because it is designed for the general purpose of preserving national political and economic union, and the incidental benefits it provides to market participants can be qualified or

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[59] *E.g., United States v. Darby*, 312 U.S. 100, 113-15 (1941).

[60] *E.g., Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174-75 (1985).

[61] 110 S.Ct. at 452.

[62] *See supra* Argument, Part I(A).

abrogated either by Congress or by the states acting under congressional authority. The Commerce Clause is clearly far different in nature from constitutional provisions containing specific guarantees of individual benefits which have been held to create "rights" under § 1983.[63]

In *Golden State* this Court indicated that a "pre-emption rule" does *not* create "rights" cognizable under § 1983 if it simply allocates power between the federal and state governments by "answer[ing] the question whether state or federal regulation should apply to certain conduct."[64] As shown above, the Commerce Clause is designed to perform precisely this function of allocating power between the federal and state governments,[65] and it is fundamentally different from

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[63] *See, e.g., Smith v. Robinson*, 468 U.S. 992, 1007-09 (1984) (individual guarantees created by the Due Process and Equal Protection Clauses of the Fourteenth Amendment are cognizable under § 1983). Constitutional provisions that guarantee individual rights typically do not permit Congress to remove these benefits or else place explicit limits on the power of Congress to do so. *E.g.*, U.S. Const. art. I, § 9, cl. 2 (providing that the writ of habeas corpus "shall not be suspended," except "in Cases of Rebellion or Invasion the public Safety may require it"); *id.*, cl. 3 ("[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress); *id.* amend. I ("Congress shall make no law" establishing religion or prohibiting the free exercise thereof, abridging the freedom of speech or the press or the right of the people peaceably to assemble and petition the Government); *id.* amend. III (no soldier may be quartered in any house without the owner's consent, except in wartime "in a manner to be prescribed by law"). In contrast, the Commerce Clause contains no express guarantee of benefits to individuals and places no limits on the power of Congress either to restrict or prohibit interstate commerce or to authorize the states to do so. *See supra* notes 58-62 and accompanying text.

[64] 110 S.Ct. at 451 n.7, 451-52. *See also id.* at 453-55 (Kennedy, J., dissenting).

[65] *See supra* Argument, Part I(B)(1).

other constitutional provisions that guarantee individual rights.[66] As a leading commentator has remarked,

> . . . when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type . . . is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government – national or state – has power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one.[67]

In light of this Court's reasoning in *Golden State*, a constitutional provision or doctrine that allocates power between the federal and state governments does not create "rights" cognizable under § 1983 unless it is *also* intended to guarantee specific and definite benefits to particular persons

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[66] *See supra* note 63 and accompanying text.

[67] J. Choper, *Judicial Review and the National Political Process* 174-75 (1980). *See also* Collins, *supra* note 28, at 1550 ("judicial enforcement of [the dormant Commerce Clause] at the behest of private parties no more secures an individual right for the purposes of § 1983 than it does in the context of the supremacy clause, or other provisions that allocate power between the states and the federal government"); Dowling, *supra* note 48, at 22-23 (litigation under the dormant Commerce Clause "is between private parties, but the issues touch the relative jurisdiction of nation and state").

that can be enforced against the states.[68] The Commerce Clause is not designed to ensure such individual benefits in either its active or dormant version, and therefore it does not secure "rights" within the scope of § 1983.

b. Petitioner's Mere Standing to Sue Based on a Violation of the Dormant Commerce Clause Does Not Establish any "Right" Cognizable under § 1983.

In asserting that the Commerce Clause creates "rights" cognizable under § 1983, Dennis strongly relies on two cases holding that persons who are adversely affected by violations of the dormant Commerce Clause have standing to challenge those violations.[69] Neither of those cases involved any claim under § 1983. Moreover, it is clear that mere standing to bring a claim under the dormant Commerce Clause is *not* equivalent to a "right" secured by the Constitution within the meaning of § 1983.

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[68] Dennis and ATA rely on a decision holding that an aggrieved taxpayer had standing to challenge a state tax that violated the intergovernmental tax immunity doctrine (*Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500, 1507 (1989)), and other decisions holding that the bicameralism and separation of powers provisions in the Constitution protect individual liberties (*e.g., United States v. Munoz-Flores*, 110 S.Ct. 1964, 1970 (1990); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986)). *See* Pet. Br. 26-29; ATA Br. 17-18. None of these cases involved a claim under § 1983; indeed, *Munoz-Flores* and *Synar* involved actions by *federal* officials, which cannot be challenged under § 1983. Moreover, none of these cases addressed the question of whether the dormant Commerce Clause is intended to secure individual "rights" protected under § 1983 as well as allocating power between the federal and state governments.

[69] *Boston Stock Exchange*, 429 U.S. at 320 n.3; *Morgan v. Virginia*, 328 U.S. 373, 376-77 (1946).

At least since the companion cases of *Scott v. Donald*,[70] this Court has reviewed cases involving claims for violation of the dormant Commerce Clause brought in federal court under federal question jurisdiction.[71] The scope of federal question jurisdiction under 28 U.S.C. § 1331, originally enacted in 1875,[72] is significantly broader than the scope of the federal remedy created by § 1983. Section 1331 establishes federal question jurisdiction over "all civil actions *arising under* the Constitution, laws or treaties of the United States,"[73] while § 1983 provides a remedy only for deprivations of "rights, privileges, or immunities *secured by* the Constitution and laws."[74]

This Court highlighted the difference between the broad "arising under" language of § 1331 and the narrower "rights . . . secured by" language of § 1983 in the *Virginia Coupon*

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[70] 165 U.S. 58 (1897); 165 U.S. 107 (1897). Prior to the creation of federal question jurisdiction in 1875, dormant Commerce Clause claims were brought exclusively in state court and reached this Court on review from state court decisions. *E.g., Gibbons*, 22 U.S. (9 Wheat.) at 1-3; *Cooley*, 53 U.S. (12 How.) at 311. As shown by both the present case and *Scheiner*, 483 U.S. at 269, many dormant Commerce Clause cases (particularly in the area of state taxation) continue to be litigated in state court with opportunity for review by this Court.

[71] *See* Collins, *supra* note 28, at 1509, 1520-21. For more recent examples of dormant Commerce Clause claims litigated under federal question jurisdiction, *see, e.g., Baldwin*, 294 U.S. at 520-21; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 339-40, 346-48 (1977). In *Hunt*, the plaintiff asserted both federal question jurisdiction under 28 U.S.C. § 1331 and federal jurisdiction to remedy civil rights violations under 28 U.S.C. § 1343, the jurisdictional counterpart of § 1983. However, the district court in *Hunt* specifically relied on § 1331 and declined to rule on whether jurisdiction would be available under § 1343. *See* 432 U.S. at 339-40 and n.4.

[72] *See* Collins, *supra* note 28, at 1497.

[73] 28 U.S.C. § 1331 (emphasis added).

[74] 42 U.S.C. § 1983 (emphasis added).

Cases, 114 U.S. 269 (1885), which were decided not long after the enactment of both statutes. In those cases, the Court held that actions challenging a Virginia state law under the Contracts Clause came within federal question jurisdiction under § 1331,[75] but did *not* establish a cause of action within the scope of § 1983.[76] The Virginia law in question repealed an earlier state statute that had permitted the payment of taxes in coupons cut from state bonds.

In one of these coupon cases, *Carter v. Greenhow*, the Court held that, although the challenge to Virginia's law based on the Contracts Clause stated a claim "arising under" the Constitution, the plaintiff taxpayer had not been deprived of any "right" secured to him by the Constitution within the meaning of § 1983. In the Court's view, the plaintiff's asserted "right to pay his taxes in coupons" and his claimed "immunity from further [state] proceedings to collect such taxes" were not "directly secured by the Constitution." Instead, the Court found that the "only right secured" to the plaintiff by the Contracts Clause was his entitlement to a "judicial determination" nullifying the Virginia statute, and the Court concluded that Virginia had not deprived the plaintiff of his right to judicial relief.[77]

This Court need not decide whether it would now reaffirm its holding in *Carter* that the Contracts Clause does not secure "rights" (except to obtain judicial process and relief) within the scope of § 1983. The critical holding in *Carter*,

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[75] *White v. Greenhow*, 114 U.S. 307, 308 (1885); *Allen v. Baltimore & Ohio R.R.*, 114 U.S. 311, 316 (1885).

[76] *Carter v. Greenhow*, 114 U.S. 317, 321-23 (1885); *Pleasants v. Greenhow*, 114 U.S. 323, 324 (1885).

[77] 114 U.S. at 322. The plaintiff in *Carter* sought to bring his claim under the jurisdictional counterpart to § 1983, which did not require a minimum amount in controversy, because he could not satisfy the $500 jurisdictional minimum then in effect under the federal question statute. *See* 114 U.S. at 320, 322-23.

which remains valid today, is that mere standing to bring a federal question action under § 1331 does not constitute a "right" cognizable under § 1983.[78] This latter holding is particularly noteworthy in view of the relatively short period of time between the enactment of §§ 1331 and 1983 and the decision in *Carter*.

The distinction drawn in *Carter* between § 1331 and § 1983 was reiterated in another 1885 decision, *Bowman v. Chicago & Northwestern Ry.*,[79] a case involving the Commerce Clause. In *Bowman*, the plaintiffs sought to recover damages resulting from the defendant railroad's refusal to transport a shipment of beer from Illinois to Iowa. The railroad relied on an Iowa law that prohibited the shipment of beer into the state without a proper certificate. The plaintiffs alleged that the Iowa law was invalid because it deprived them of their constitutional "right" to ship goods in interstate

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[78] ATA contends, based on Justice Stone's dictum in *Hague v. CIO*, 307 U.S. 496, 527 (1939), *quoted in Chapman*, 441 U.S. at 613 n.29, that *Carter* was decided merely as "a matter of pleading." ATA Br. 11-12. This reading of *Carter* is clearly "strained" (Collins, *supra* note 28, at 1535 n.221) in view of the careful distinction made by the Court in *Carter* between the plaintiff's "right" to obtain a judicial invalidation of the Virginia law and the lack of any "right" under § 1983 to enforce his contractual claim to pay Virginia taxes in coupons.

In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 n.6 (1972), the Court stated that *Carter* and *Pleasants* were "governed by unique considerations" because they involved "judicial interference with the enforcement of state tax laws." It is true that *Carter* and *Pleasants*, like the present case, involved the validity of state tax laws. However, the holding in these cases as to the availability of relief under § 1983 was not expressly limited to cases involving state taxes.

[79] 115 U.S. 611 (1885).

commerce,[80] and they sought review in this Court based on a jurisdictional counterpart to § 1983.[81]

The Court in *Bowman* held that it had no jurisdiction to review plaintiffs' claim. Although the claim might be one "arising under the Constitution," plaintiffs had not shown "the deprivation of a right, privilege or immunity secured by the Constitution."[82] The Court held that the plaintiffs' asserted "right" to ship goods in interstate commerce was based only on a "principle of general law," since the Constitution itself did *not* require the railroad to ship plaintiffs' beer. Instead, the Constitution was relevant only indirectly in determining whether the Iowa statute was valid and thereby excused the railroad from its duty under "general law" to carry plaintiffs' goods. Accordingly, the Court concluded that plaintiffs' asserted "right" was *not* "secured by the Constitution."[83]

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[80] The opinion in *Bowman* does not specifically refer to the Commerce Clause, but it is evident from the facts of the case that the Commerce Clause was the only constitutional provision on which the plaintiffs could have relied. *See* 115 U.S. at 612-15; Collins, *supra* note 28, at 1520 & n.148, 1551 & n.297.

[81] The plaintiffs relied on Rev. Stat. § 699(4), which granted to the Supreme Court jurisdiction, without regard to the amount in controversy, to review any federal court judgment or decree in a case alleging "the deprivation of any right, privilege, or immunity secured by the Constitution." The plaintiffs sought such review because they could not show the minimum amount in controversy required for federal question jurisdiction. *See Bowman*, 115 U.S. at 613-15; *cf. Maine v. Thiboutot*, 448 U.S. 1, 16 n.2 (1980) (Powell, J., dissenting) (discussing Rev. Stat. § 699(4)).

[82] 115 U.S. at 615-16.

[83] *Id.* at 615. In holding that plaintiffs' claimed entitlement was not a "right . . . secured by the Constitution," but was instead "a right existing without [*i.e.*, outside] the Constitution" (*id.*), the Court in *Bowman* reached the same conclusion that Chief Justice Marshall and Justice Johnson had previously expressed in *Gibbons v. Ogden*. In *Gibbons*, both Marshall and Johnson acknowledged, based on natural law principles, that

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Bowman and *Carter* demonstrate that claims by private parties under the dormant Commerce Clause do not involve "rights . . . secured by the Constitution" within the meaning of § 1983, even though such parties have standing to maintain a suit based on federal question jurisdiction. A dormant Commerce Clause claim "aris[es] under the Constitution" for purposes of § 1331, because the claim calls into question the validity of a state law under the Constitution. Under the federal doctrine of standing, a person adversely affected by an unconstitutional state law is deemed to have standing to challenge that law.[84] However, the dormant Commerce Clause does not "secure" any "rights" for purposes of § 1983, because the entitlement of an individual to engage in interstate commerce is not based on the Commerce Clause and is,

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each person had a "right" *outside of the Constitution* (*i.e.*, in the state of nature) to engage in commerce. Justice Johnson pointed out, however, that this natural "right" became subject to the "supreme . . . power," first of the sovereign states under their own constitutions and later of the sovereign federal government under the federal Constitution, "to limit and restrain [commerce] at pleasure." *Gibbons*, 22 U.S. (9 Wheat.) at 227. Similarly, Chief Justice Marshall declared that the federal Constitution had granted to Congress the "complete," "plenary" and "supreme" power to regulate the natural "right" of commerce which was "existing" when the Constitution was ratified. *Id.* at 196-97, 211.

Thus, Dennis and ATA are clearly wrong in suggesting that *Gibbons* recognized an individual "right" to engage in interstate commerce *based on the Constitution itself*. Pet. Br. 19-20; ATA Br. 18. It is plain that the "right" identified by Chief Justice Marshall and Justice Johnson was based on natural law principles existing outside of the Constitution, and that both Justices considered this "right" to have been completely subordinated to the power of Congress under the Commerce Clause.

[84] *See Boston Stock Exchange*, 429 U.S. at 320 n.3 (person adversely affected by discriminatory state tax had standing to assert dormant Commerce Clause claim, because that person had shown sufficient "injury in fact" and was "arguably within the zone of interests to be protected" by the Commerce Clause).

in fact, subject to the plenary power of Congress to prohibit or restrict interstate commerce under that Clause.[85]

In addition, the standard for identifying "rights" cognizable under § 1983 is far more exacting than the "zone of interests" test applied in standing cases. To establish standing, a plaintiff need only show that his claim is "*arguably* within the zone of interests to be protected by the statute or constitutional guarantee in question."[86] This "test is not meant to be especially demanding," and "there need be no indication of congressional purpose to benefit the would-be plaintiff."[87] All that the plaintiff must show is a "plausible relationship" between his asserted interest and the policies to be advanced by the relevant constitutional or statutory provision.[88]

In contrast, as shown above, a constitutional or statutory provision does not create "rights" cognizable under § 1983 unless it is designed to confer specific and definite benefits on particular persons that can be enforced against the states.[89] Thus, unlike the liberal test of standing, the controlling standard under § 1983 requires an explicit constitutional or statutory purpose to guarantee specific and enforceable benefits. It therefore is clear that Dennis' mere standing to assert a

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[85] *See supra* Argument, Part I(B)(2)(a). *See also Connor v. Rivers*, 25 F. Supp. 937, 938 (N.D. Ga. 1938) (three-judge court) (holding that challenge to Georgia statute based on the dormant Commerce Clause could not be heard under the jurisdictional counterpart of § 1983, because there was "no claim or evidence that said Georgia Statute deprives the petitioner 'of any right, privilege, or immunity secured by the Constitution'"), *aff'd per curiam*, 305 U.S. 576 (1939).

[86] *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396 (1987) (emphasis added) (quoting *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

[87] *Id.* at 399-400.

[88] *Id.* at 403.

[89] *See supra* Argument, Part I(A).

federal claim under the dormant Commerce Clause does not constitute a "right" cognizable under § 1983.[90]

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[90] In addition to *Boston Stock Exchange* and *Morgan*, which simply affirmed the standing of private parties to assert dormant Commerce Clause claims, Dennis and ATA assert that several other cases have recognized a "right" to engage in interstate commerce. Pet. Br. 20-21; ATA Br. 15-16, 18. None of these cases, however, presented a claim under § 1983. *Garrity v. New Jersey*, 385 U.S. 493 (1967), involved the privilege against self-incrimination secured against state interference under the Fourteenth Amendment. As noted by the court below, the reference in *Garrity* (385 U.S. at 500) to a "right" to engage in interstate commerce was "mere dictum." Pet. Cert. App. 7a (quoting *Kassel*, 730 F.2d at 1145).

In addition, contrary to the suggestion of ATA, *United States v. Guest*, 383 U.S. 745 (1966) did *not* specifically base the constitutional right to travel on the Commerce Clause. The Court in *Guest* recognized that state statutes interfering with the interstate transportation of persons had been struck down under the Commerce Clause in cases such as *Edwards v. California*, 314 U.S. 160 (1941). But in *Guest* and subsequent cases, the Court declined to locate the right to travel in any specific provision of the Constitution. *Guest*, 385 U.S. at 757-59; *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902-03 (1986) (plurality opinion).

Dennis and ATA also rely on references to a "right" to engage in interstate commerce in *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891), and *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 21, 48 (1910). However, as indicated by the court below, it appears that both decisions were primarily concerned with "the separation of powers between the national and state legislatures." Pet. Cert. App. 7a-8a (quoting *Kassel*, 730 F.2d at 1145). Both *Crutcher* and *Western Union* held that state interference with interstate commerce is unlawful because the "power of Congress over interstate commerce is as absolute as it is over foreign commerce," and, therefore, "the matter is not within the province of state legislation, but within that of national legislation." *Crutcher*, 141 U.S. at 57, *quoted in Western Union*, 216 U.S. at 21. In addition, to the extent that *Crutcher* and *Western Union* were read to suggest that the Commerce Clause establishes an individual constitutional "right" to engage in interstate

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It should also be noted that the standing of private parties to bring claims under the dormant Commerce Clause is only indirect and derivative. As shown above, the fundamental purpose of the Commerce Clause is to preserve national political and economic union,[91] and the Clause is not designed to protect the individual rights of market participants.[92] Market participants are only "indirect" beneficiaries of the Commerce Clause,[93] and in bringing suit they act merely as "surrogates" for the national interests protected by the Clause.[94] In sum, the derivative standing of market participants to assert the national interests served by federal regulatory power over interstate commerce does not rise to the level of a guaranteed individual "right" protected under § 1983.

3. The Legislative History of § 1983 Shows that Congress Did Not Intend to Create a Remedy Thereunder for Violations of the Dormant Commerce Clause.

The legislative history of the Civil Rights Act of 1871 demonstrates that Congress did not intend to provide a remedy under § 1983 for violations of the dormant Commerce Clause or other constitutional provisions allocating power between the federal and state governments. As described

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commerce, such a reading would be completely inconsistent with *Gibbons* and *Bowman*. *See* supra note 83 and accompanying text.

Thus, none of the cases relied on by Dennis and ATA prove their contention that this Court has recognized a "right" under the Commerce Clause that is of the same nature as "rights" cognizable under § 1983.

[91] *See supra* Argument, Part I(B)(1).

[92] *See supra* Argument, Part I(B)(2)(a).

[93] *Kassel*, 730 F.2d at 1145.

[94] Collins, *supra* note 28, at 46. *See also* J. Choper, *supra* note 67, at 174-75; Dowling, *supra* note 48, at 22-23.

above, the primary focus of § 1983, and the 1871 Act generally, was to provide additional federal remedies to protect the individual rights guaranteed by the Civil War Amendments.[95] Moreover, in explaining the scope of the 1871 Act, the Act's supporters drew a clear distinction between constitutional provisions guaranteeing individual rights, which *would* come within the scope of the Act's protections, and constitutional provisions establishing the basic structure of federalism, which would *not* be affected by the Act.

Representative Shellabarger, the House sponsor and floor manager of the 1871 Act,[96] explained this distinction in a floor speech that has been frequently cited in cases construing § 1983.[97] Shellabarger made his comments in the course of discussing the original House version of Section 2 of the 1871 Act. However, his remarks had a direct relevance to Section 1 (*i.e.*, § 1983), because they dealt with the scope of the "rights, privileges, or immunities" that would be protected under Section 2.[98] Shellabarger first contended that Congress had

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[95] *See supra* notes 28-33 and accompanying text.

[96] *See supra* note 29 and accompanying text.

[97] *E.g.*, *Monell*, 436 U.S. at 670-71; *Golden State*, 110 S.Ct. at 454 (Kennedy, J., dissenting); *Kassel*, 730 F.2d at 1146 n.16.

[98] The original House version of Section 2 would have created criminal penalties for any private conspiracy "to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States," provided that the act would constitute any of several specified federal felonies (*e.g.*, murder, manslaughter, assault and battery, criminal obstruction of legal process) if it were committed in a place under federal jurisdiction. *Monroe v. Pape*, 365 U.S. at 180-81. Section 2 was strongly criticized, even by some supporters of the 1871 Act, as an unwarranted extension of federal authority into matters traditionally governed by state criminal law. Accordingly, the scope of Section 2 was narrowed substantially prior to its enactment. *See, e.g., Scott*, 463 U.S. at 834-35; *Griffin v. Breckenridge*, 403 U.S. 88, 99-102 (1971); *Monroe v. Pape*, 365 U.S. at 180-81.

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power to "protect those rights of American citizenship so solicitously and so abundantly guarded and guarantied and made eternal as the Constitution itself."[99] He then reviewed the original Constitution and distinguished the provisions dividing federal and state powers from the provisions guaranteeing individual rights:

> Most of the provisions of the Constitution which restrain and directly relate to the States . . . relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers . . . . But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.
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> These three are: first, that as to fugitives from Justice [Art. IV, § 2, cl. 2]; second, that as to fugitives from service, (or slaves;) [Art. IV, § 2, cl. 3] third, that declaring that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" [Art. IV, § 2, cl. 1].

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Notwithstanding the different remedies provided by Sections 1 and 2 of the 1871 Act, the basic purpose was the same for Section 2 as it was for Section 1 – *i.e.*, to protect the federal "rights, privileges, [and] immunities" of citizens. Moreover, the close relationship of the two sections is indicated by the fact that, after Shellabarger completed his explanation of Section 2, he stated: "Here, gentlemen, I leave *the first and the second sections* of this bill." Cong. Globe App. 70 (emphasis added).

[99] Cong. Globe App. 69.

> And, sir, every one of these . . . the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for, Congress has by legislation affirmatively interfered to protect or subject such persons.[100]

Thus, Shellabarger considered that constitutional provisions "divi[ding] the political powers of the State and General Governments" did *not* "relate directly to the rights of persons within the States." In contrast, he believed that the 1871 Act, like earlier federal laws protecting individual rights, would enforce those constitutional provisions that *did* "secur[e] the rights . . . of persons within the States, as between such persons and the States."[101] Shellabarger's comments plainly indicate that he would *not* have considered the Commerce Clause to be a source of any "rights" cognizable under § 1983.[102]

Contrary to the assertion of Dennis and ATA that Shellabarger's comments are merely a "fragment[] of legislative

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[100] Cong. Globe App. 69-70.

[101] *Id.* at 69. Shellabarger made an ironic reference to the 1793 federal fugitive slave law, enacted to secure the rights of slaveowners under Article IV, § 2, cl. 3, which had been upheld in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). Shellabarger declared:

> [S]hall it be endured now that those decisions which were invoked and sustained in favor of bondage shall be stricken down when first called upon and invoked in behalf of human rights and American citizenship? No, Mr. Speaker, no; I appeal to them . . . as authorizing affirmative legislation in protection of the rights of citizenship under Federal law, since now these rights of citizenship are brought by the fourteenth amendment, under the care of the Constitution itself, as to all citizens.

Cong. Globe App. 70.

[102] *See Kassel*, 730 F.2d at 1146 n.16.

history,"[103] in fact other supporters of § 1983 drew the same distinction between power-allocating provisions and rights-granting provisions of the Constitution. For example, Representative Hoar stated:

> The object of the Constitution of the United States is twofold:
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> *First*. To concentrate the strength of the whole people and provide for uniform expression of its will, for the protection and regulation of commercial intercourse, domestic and foreign.
>
> *Second*. To secure the blessings of liberty and promote the general welfare by prohibiting the States from doing what is inconsistent with civil liberty, and compelling them to do what is essential to its maintenance.[104]

Hoar stated that the 1871 Act was designed to enforce constitutional provisions providing for "the protection of personal liberties and civil rights," as contrasted with provisions

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[103] Pet. Br. 34 (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982)); ATA Br. 10 (same).

Even if Shellabarger's comments stood alone, which they do not, they would be entitled to substantial weight because they represent the detailed explanation of the principal sponsor of the legislation. His comments take on additional weight because there is no published House or Senate committee report explaining § 1983 (*see Monell*, 436 U.S. at 665-87). *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982). Moreover, contrary to the claims of Dennis and ATA, Shellabarger's comments about the scope of "rights" protected by § 1983 do not contradict the statutory language. The term "rights" is not defined in § 1983. Dennis and ATA simply assume the answer to the question that Shellabarger was addressing (*viz.*, whether the Commerce Clause or other constitutional provisions allocating state and federal powers do in fact create "rights" cognizable under § 1983). *See* Pet. Br. 33-34; ATA Br. 5-6, 10-11.

[104] Cong. Globe 333.

securing "[t]he protection of commerce."[105] Similarly, Senator Trumbull distinguished between those constitutional provisions "establishing a nation with national authority," including "authority . . . to regulate commerce," and those provisions providing for "the protection of the individual citizen."[106] Trumbull indicated that the basic purpose of the 1871 Act was to enforce the Fourteenth Amendment by preventing the states from denying due process and equal protection to their citizens.[107]

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[105] *Id.* (identifying U.S. Const. art. IV, § 4, guaranteeing to each state a republican form of government, as a provision "for the protection of personal liberty and civil rights"). Hoar was a leading Republican member of the House and served as a member of the House judiciary committee. *See* 5 *Dictionary of American Biography* 87 (D. Malone ed. 1961); *Monroe v. Pape*, 365 U.S. at 177, 182-83.

[106] Cong. Globe 575 (identifying the Privileges and Immunities Clause of Art. IV, § 2, cl. 1 as a provision for "the protection of the individual citizen").

The distinction made by Shellabarger, Hoar and Trumbull between power-allocating provisions and rights-granting provisions of the Constitution was consistent with the moderate nature of the Republicans' Reconstruction program. The Republicans intended to establish federal guarantees for fundamental civil and political rights, and to ensure equal protection of the laws for all citizens, by adopting the Civil War Amendments and implementing legislation. However, the Republicans did not intend to change the basic structure of federalism or to alter the basic distribution of powers between the federal and state governments. *See, e.g., Developments in the Law-Section 1983 and Federalism, supra* note 28, at 1141-56; W. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 7-10, 113-23, 163-64 (1988).

[107] *Id.* at 578-79. Trumbull had been the leading Senate sponsor of the Thirteenth Amendment and the Civil Rights Act of 1866, and he was a member of the moderate wing of the Republican Party in 1871. He generally supported the 1871 Act, although he opposed Senator Sherman's unsuccessful amendment that sought to impose liability on municipalities if they failed to prevent riots that deprived citizens of their federal

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In sum, proponents of the 1871 Act emphasized that § 1983 was intended to provide a federal remedy to enforce constitutional provisions guaranteeing the rights of individual citizens. The proponents also plainly indicated that they did *not* view provisions allocating power between the federal and state governments as sources of individual rights to be protected under § 1983.[108] The legislative history thus manifests

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rights. *See* Cong. Globe 579, 758-59; 10 *Dictionary of American Biography* 19-20 (D. Malone ed. 1964). *See also Monell*, 436 U.S. at 665-83 (reviewing history of Sherman amendment).

[108] The supporters of § 1983 did not entirely agree on the scope of constitutional rights that would be protected by § 1983. Representatives Shellabarger and Hoar and Senator Boreman argued (Cong. Globe App. 69, 228-29; Cong. Globe 334) that the rights protected under § 1983 would include all of the natural rights identified by Justice Bushrod Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823), as protected under the Privileges and Immunities Clause of Art. IV, § 2, cl. 1. However, Justice Washington's expansive view of Art. IV, § 2, cl. 1, and its possible application to the Privileges and Immunities Clause of the Fourteenth Amendment, were both rejected in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-78 (1873). *See* L. Tribe, *supra* note 39, §§ 6-34 & 7-2 at 529-30, 550-53.

Other supporters of § 1983 rejected *Corfield v. Coryell* as an accurate definition of the rights protected under Section 1983. Cong. Globe App. 84 (remarks of Rep. Bingham, rejecting relevance of *Corfield* and arguing that the rights protected under the Fourteenth Amendment and the 1871 Act would include the rights expressly protected by the first eight amendments to the Constitution); *id.* at 152, 314 (remarks of Reps. Garfield and Burchard, rejecting *Corfield*). Senator Trumbull contended that the Fourteenth Amendment and the 1871 Act protected only the rights to due process and equal protection of the laws. Cong. Globe 576-77, 578-79.

Notwithstanding these disagreements, it is significant that all of the constitutional provisions referred to by proponents of the 1871 Act

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a clear congressional understanding in 1871 that the Commerce Clause did *not* create "rights" cognizable under § 1983.

In 1980, Congress was again presented with the question of whether claims under the dormant Commerce Clause should be brought within the scope of § 1983. Both the House and the Senate received advice that there was a serious doubt whether claims for violation of the dormant Commerce Clause could be brought in federal court under 28 U.S.C. § 1343, the jurisdictional counterpart to § 1983.[109] Congress responded, however, *not* by amending § 1343 but instead by removing the $10,000 amount in controversy requirement from 28 U.S.C. § 1331, so that federal courts could exercise *federal question jurisdiction* over all "suits challenging the constitutionality of State laws that do not come within 28 U.S.C. § 1343."[110] This postenactment history provides

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contained specific guarantees of individual liberties. None of the proponents referred to the Commerce Clause or other provisions of the Constitution allocating federal and state powers as a source for "rights" protected under § 1983.

[109] S. Rep. No. 827, 96th Cong., 2d Sess. 5 & n.9, 14 (Exhibit A) (letter dated Oct. 13, 1977, from Prof. C. Wright to Rep. Kastenmeier); H.R. Rep. No. 1461, 96th Cong., 2d Sess. 2 n.6 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 5063, 5064 n.6; H.R. Rep. No. 893, 95th Cong., 2d Sess. 3 n.11, 8 & n.26, 18-19 (1978) (Exhibit A) (Wright letter to Kastenmeier).

With respect to claims, including those under the dormant Commerce Clause, that allege the deprivation of "rights" secured by the Constitution, the scope of the remedy provided by § 1983 is coextensive with the scope of jurisdiction authorized by 28 U.S.C. § 1343(a)(3). *Lynch*, 405 U.S. at 544 n.7.

[110] H.R. Rep. No. 893, *supra* note 109, at 8. *See* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (removing $10,000 amount in controversy requirement from § 1331); Collins, *supra* note 28, at 1554 and n.308 (noting that Congress amended § 1331 in 1980 "in part precisely because of doubts concerning whether § 1343(3) . . . would

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further and compelling evidence of Congress' understanding that dormant Commerce Clause claims do not assert "rights" protected by § 1983.[111]

C. Application of § 1983 to Dormant Commerce Clause Claims Would Not Further the Purposes of the Statute and Would Seriously Prejudice the Interests of State and Local Governments.

Dennis has asserted that the application of § 1983 to claims under the Commerce Clause is "extremely important to the effective enforcement" of the Clause (Pet. Cert. 12). An analysis of the nature and long history of Commerce Clause litigation, however, reveals that this assertion is unwarranted. The expansion of § 1983 into the realm of Commerce Clause litigation is not only unnecessary to insure effective enforcement of the Clause, but would also be extremely detrimental to state and local government interests.

Claims under the dormant Commerce Clause, unlike claims brought to redress violations of individual constitutional rights, are generally economic in nature and involve disputes between business interests and governmental bodies over taxes or regulatory actions. From a historical perspective, it was not until four years *after* § 1983 was enacted that private parties began to litigate Commerce Clause claims in federal court.[112] Previously, Commerce Clause claims were brought in state court and did not enter the federal system

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reach nonfourteenth amendment claims, such as dormant commerce clause actions").

[111] *See North Haven*, 456 U.S. at 535 (relying on postenactment legislative history in interpreting federal statute); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (same).

[112] *See* Act of March 3, 1875, § 1, 18 Stat. 470 (creating federal question jurisdiction), *codified as amended at* 28 U.S.C. § 1331.

until reviewed by this Court.[113] Following enactment of the federal question statute in 1875, actions involving Commerce Clause claims initiated in federal court were based on federal question jurisdiction, not § 1983 and its jurisdictional counterpart.[114] Even after the creation of federal question jurisdiction, many if not most dormant Commerce Clause cases have been brought in state courts, including the instant case, subject to the possibility of review in this Court.[115]

Thus, market participants have historically possessed sufficient opportunities and incentives to litigate Commerce Clause claims in state or federal court without resort to § 1983. The only practical reason to bring such a claim under the Civil Rights Legislation is to enhance the opportunity to

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[113] *See supra* note 70.

[114] *See* Collins, *supra* note 28, at 1507-33, 1551; *Scott v. Donald*, 165 U.S. 58, 72-73, 101 (1897) (dormant Commerce Clause claim upheld under federal question statute); *cf. Carter v. Greenhow*, 114 U.S. at 322-23 (1885) (Contracts Clause does not secure individual rights within the meaning of § 1983; Congress intended such claims to be litigated in state courts, with review by the Supreme Court, or in lower federal courts by reason of federal question jurisdiction). In some instances, Commerce Clause actions could be brought in federal court by the invocation of diversity jurisdiction. *See*, Collins, *supra* note 28, at 1508, 1527; *see, e.g., McNeill v. Southern Ry. Co.*, 202 U.S. 543, 559 (1906).

[115] *E.g., Hood v. DuMond*, 336 U.S. at 529; *Exxon*, 437 U.S. at 121-24; *Scheiner*, 483 U.S. at 269. Dennis was precluded from bringing an injunctive action to challenge the tax imposed pursuant to Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984) in federal court by the Tax Injunction Act, 28 U.S.C. § 1341 (1982). Even prior to the enactment of § 1341 in 1937, this Court applied the principle of comity in adopting a policy of federal court restraint in actions involving state taxes, based on the traditional equitable doctrine that courts of equity will not act when remedies at law are plain, adequate, and complete. *See, e.g., Matthews v. Rodgers*, 284 U.S. 521 (1932); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276 (1909). The implications of the Tax Injunction Act and these precedents are further discussed *infra* in Argument, Part II.

recover damage awards and to secure attorneys fees under § 1988.[116]

As a matter of policy, attorneys fee awards are neither necessary nor desirable in Commerce Clause litigation. If § 1983 were held to create a cause of action for claims under the Commerce Clause, any person conceivably affected by a state or local economic regulation would be encouraged to construct a claim under the Commerce Clause in order to obtain an award of attorneys fees under § 1988.[117] Such a result would undermine the Court's recognition of the general unavailability of attorneys fees under the "American Rule" governing recovery of counsel fees stated in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 271 (1975). Business interests challenging discriminatory state regulations (unlike individuals seeking redress for violations of

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[116] Dennis acknowledges the § 1983 issue raised in this case "is important principally for purposes of petitioner's entitlement to costs and attorney's fees" under § 1988. Pet. Br. 12-13. Dennis also concedes that § 1983 does not authorize Dennis to obtain damages against Nebraska or against Respondents, state officials who have acted in good faith in their official capacities. *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989). *See* Pet. Br. 13 n.7.

[117] While Dennis seeks to emphasize the particular circumstances in this case as a means to illustrate the need for applying §§ 1983 and 1988 to claimed violations of the Commerce Clause to insure "effective enforcement" of the Clause, Pet. Br. 13 n.8 and Pet. Cert. 13-15, it is necessary to look beyond these assertions to determine the broad implications of such a ruling and the detrimental effect such a conclusion would have on state and local governmental interests. The Court should not lose sight of the fact that PTCA, while dismissed as a party for lack of standing in this case, was the lead plaintiff in each of six other state court cases cited by Dennis in which reciprocal taxes such as adopted by Nebraska were challenged as violative of the Commerce Clause. Pet. Br. 5 n.3. The fact that PTCA was represented by the same counsel appearing on behalf of Petitioner in this action in each of these cases belies the notion that competent counsel will be unwilling to take on cases of this nature without the availability of § 1983.

personal rights guaranteed by the Constitution) simply do not need the economic incentive of attorneys fees to prosecute Commerce Clause claims. The imposition of attorneys fees in such cases would place an added burden on state and local governments "as a consequence of [their] good faith efforts at economic regulation."[118]

With regard to damages, while the Eleventh Amendment may protect states and state officials sued in their official

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[118] Collins, *supra* note 28, at 1566. The availability of attorneys fees under § 1988 in cases where a plaintiff has prevailed only on a pendent non-section 1983 constitutional claim further illustrates the potential for the imposition of added financial burdens on state and local governments should § 1983 actions be expanded into the arena of Commerce Clause litigation. *Cf. Maher v. Gagne*, 448 U.S. 122, 127, 132-33 and n.15 (1980) (fee recovery proper on statutory, non-civil rights claim pendent to substantial constitutional claim in a case where both statutory and constitutional claims were settled favorably to plaintiff without litigation). Moreover, if claims under the dormant Commerce Clause were cognizable under § 1983, the Court's comparatively broad interpretation of "prevailing party" under § 1988 would also expose state and local governments to attorneys' fee awards in cases where business plaintiffs challenged local or state economic regulations under the Commerce Clause and succeeded in obtaining any type of meaningful relief (*e.g.*, rescission or modification of a challenged local ordinance or state agency rule). *See Texas State Teachers Ass'n v. Garland Independent School Dist.*, 109 S.Ct. 1486, 1492 (1989) ("prevailing party" for purposes of § 1988 "must be one who has succeeded on any significant claim affording it some relief sought, either *pendente lite* or at the conclusion of the litigation"); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (plaintiff must be able to point to resolution of dispute which materially alters the parties' legal relationship in the manner Congress sought to promote under the fee statute). *See also Maine v. Thiboutot*, 448 U.S. 1, 24-25 (1980) (Powell, J., dissenting) (noting that "[t]here is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought," and, recognizing that, under the liberal rules of pendent jurisdiction, "ingenious pleaders may find ways to recover attorneys fees in almost any suit against a state defendant").

capacities from liability for damages under § 1983, *see Will v. Michigan Dept. of State Police*, 109 S.Ct. at 2309-12 and n.10 (state official sued in his or her official capacity under § 1983 can be sued only for prospective injunctive relief), local governments and individual officials would be liable to the extent regulatory schemes are by nature "custom or policy," even if such officials acted in good faith. *See Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980) (city acting pursuant to custom or policy may not claim good faith immunity); *see also Monell*, 436 U.S. at 690 n.54 (municipality not arm of the state for Eleventh Amendment purposes).[119]

Thus, the threat of damage claims for lost economic opportunity and awards of attorneys fees in Commerce Clause litigation would impose a serious financial burden on government officials and would undoubtedly have a chilling effect on their willingness to adopt innovative policies in areas such as taxation and the regulation of business activity. The extension of § 1983 to dormant Commerce Clause claims, with the potential for damage awards and recovery of litigation costs and attorneys fees under § 1988, would likely result in such claims becoming "tomorrow's cottage industry for a

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[119] While state officials sued in their official capacities may not be held liable for damages under *Will*, state officials sued in their personal capacities may be held individually liable for damages in a § 1983 action, as well as for attorneys fees under § 1988. *Kentucky v. Graham*, 473 U.S. 159, 166-171 (1985) (state official can be sued in his personal capacity under § 1983 for damages and attorneys fees, but fees awarded in a personal capacity action may not be assessed against the state government). While state officials sued in personal capacity actions may assert personal immunity defenses, *see Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity based on good faith reliance on existing law), the threat of potential personal liability would likely have an adverse effect on the willingness of state officials to undertake new or innovative regulatory actions for fear that, in hindsight, their decisions will be second-guessed and found to fall outside any immunity defense.

new class of constitutional litigants."[120] The purpose of § 1983, to provide a means to redress violations of individual rights guaranteed by the Constitution and federal laws, is not advanced by extending its provisions as a means to promote claims by business interests that are not based on constitutional or statutory guarantees. The expansion of § 1983 into the realm of Commerce Clause litigation is, therefore, unwarranted as a matter of both law and policy.[121]

II. IF THE COURT SHOULD DETERMINE THAT § 1983 PROVIDES A REMEDY FOR VIOLATIONS OF THE DORMANT COMMERCE CLAUSE, THIS ACTION SHOULD BE REMANDED TO ALLOW THE NEBRASKA STATE COURTS TO DETERMINE WHETHER THEY MUST ENTERTAIN A CLAIM UNDER § 1983 IN A CHALLENGE TO A STATE TAX.

In the event this Court holds that claims for violations of the dormant Commerce Clause are generally cognizable under

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[120] Collins, *supra* note 28, at 1566.

[121] *Amicus* ATA's criticisms of Respondents' policy arguments against extending § 1983 to Commerce Clause claims simply miss the mark. ATA mischaracterizes Respondents' position as advocating that § 1983 "should not provide a remedy for violations of 'economic' rights." ATA Br. at 20. As noted previously, the Commerce Clause does not secure *any* "rights", economic or otherwise, within the meaning of § 1983. Respondents maintain that the invocation of § 1983 (and the accompanying fee provision in § 1988) by business interests with an economic stake in challenging state or local regulation under the Commerce Clause represents an attempt to use the statute to address constitutional claims which are wholly at odds with the language of § 1983, as well as the history underlying its enactment. This position does not attempt to resurrect the "personal" versus "property" rights distinction rejected in *Lynch*, as implied by ATA. Instead, Respondents contend that the "right" claimed by Dennis and ATA, whether it is considered as a "personal" or "property" interest, simply does not exist in the Constitution.

§ 1983, Respondents submit that this action should be remanded to the Nebraska state courts to allow consideration of whether they are required to entertain jurisdiction of a claim under § 1983 in which a constitutional challenge is raised to a state tax. While Petitioner has framed the Question Presented as "[w]hether a claim that a state tax discriminates against interstate commerce in violation of the Commerce Clause and that seeks an injunction against enforcement of the tax is cognizable under 42 U.S.C. § 1983," it is evident the actual holding of the Nebraska Supreme Court addressed only the narrower issue of whether a cause of action exists under § 1983 for violations of the Commerce Clause. Because the court below held that dormant Commerce Clause claims do not establish a cause of action under § 1983, there was no need or occasion for that court to consider whether, if such a claim were cognizable, that court would nevertheless decline to entertain the § 1983 claim in this case because it involved a challenge to a state tax. Thus, because this jurisdictional issue was not presented to or addressed by courts below, this Court should remand this case, if it is found to be cognizable under § 1983, to allow the Courts below to determine whether they must entertain a claim under § 1983 in a state tax case.[122]

Taxpayer suits challenging the constitutionality of state tax statutes are not actionable in federal court. Federal courts have declined to entertain state tax challenges by virtue of a long-standing policy of federal judicial non-interference in

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[122] The Nebraska Supreme Court did note that a party who prevails on a ground other than § 1983 is entitled to attorneys fees under § 1988 if § 1983 would have been an appropriate basis for relief. Pet. Cert. App. 5a. This mere observation does not preclude remand for consideration of whether state courts are required to entertain claims under § 1983 in state tax cases, as the courts below decided only the narrow issue of the cognizability of *any* claim under § 1983 based on a violation of the Commerce Clause.

state tax matters.[123] This policy is expressly embodied in the Tax Injunction Act,[124] the Eleventh Amendment[125] and the principle of comity articulated by the Court in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981).

The Tax Injunction Act precludes federal courts from granting prospective relief - either injunctive or declaratory[126] – from allegedly unconstitutional state taxation, provided a "plain, speedy and efficient remedy" is available in state court.[127] Taxpayers are also prohibited from suing state officials in their individual capacities for damages in federal court, as a matter of comity, where the state court remedy is "plain, speedy and efficient." *McNary*, 454 U.S. at 113-14.

The Court has recognized that, as a general matter, state courts possess concurrent jurisdiction with federal courts over claims brought under § 1983.[128] The Court has, however, left

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[123] *See supra* note 115, citing 28 U.S.C. § 1341 and court decisions prior to enactment of that statute which recognized the policy of equitable restraint exercised by federal courts in state tax matters.

[124] 28 U.S.C. § 1341 (1982), which provides: "The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[125] U.S. Const. amend. XI. The Eleventh Amendment precludes federal courts from entertaining actions seeking retroactive relief against a state, and, therefore, prevents a taxpayer from asserting a § 1983 damages action in federal court against a state.

[126] *See California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

[127] The fact that a taxpayer seeks relief under § 1983 in federal court is irrelevant where state law provides a plain, speedy and efficient remedy. *Rosewall v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981).

[128] *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) ("Any doubt that state courts may also entertain [§ 1983] actions was dispelled by *Martinez*").

open the question whether state courts are *required* to entertain such claims. For example, in *Martinez*, 444 U.S. at 283 n.7, the Court stated that "[w]e have never considered the question whether a State *must* entertain a claim under § 1983" (emphasis in original).[129]

The Court recently observed in *Howlett v. Rose* that "[v]irtually every State has expressly or by implication opened its courts to § 1983 actions and there are no state court systems that refuse to hear § 1983 cases."[130] However, in the special area of state taxes, several state courts have specifically refused to hear § 1983 claims.[131] In reaching this conclusion, state courts have invariably relied upon the special remedial considerations presented by congressional action in the area of state taxation by virtue of 28 U.S.C. § 1341, and the Court's decision in *McNary* recognizing the unavailability of the remedy provided under § 1983 in federal court.[132] Indeed, the Court recently recognized that the issue

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[129] *See also Thiboutout*, 448 U.S. at 3 n.1 (noting that *Martinez* had reserved the question of whether state courts must entertain § 1983 actions).

[130] 110 S.Ct. 2430, 2444 n.20 (1990) (citing Steinglass, *Section 1983 Litigation in State Courts* 1-3 and App.E. (1989)).

[131] The Court's recent observation in *Howlett*, 110 S.Ct. at 2444 n.20, that "there are no state court systems that refuse to hear § 1983 cases" is therefore incorrect to the extent it is construed to indicate all states have consistently entertained § 1983 actions in cases involving challenges to state taxes.

[132] *Backus v. Chilivis*, 236 Ga. 500, 505, 224 S.E.2d 370, 374 (1976) (taxpayer may not circumvent state procedures by asserting § 1983 claim); *State Tax Comm'n v. Fondren*, 387 So.2d 712, 723 (Miss. 1980) (en banc) (because § 1983 claim challenging state tax laws may not be litigated in federal court, it likewise may not be litigated in state court), *cert. denied*, 450 U.S. 1040 (1981); *Stufflebaum v. Panethiere*, 691 S.W.2d 271, 272 (Mo. 1985) (en banc) (§ 1983 claim challenging state tax is improper where state law provides plain, adequate, and complete

(Continued on following page)

of whether state courts *must* assume jurisdiction under § 1983 in challenges to the imposition of state taxes was "not entirely clear." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987). In *Ragland*, the Court deemed it appropriate to remand this issue to the state court to consider whether it was required to hear such a claim. *Id.* at 233-34. Similarly, should the Court hold that the courts below erred in finding that a violation of the dormant Commerce Clause does not, under any circumstance, state a cause of action under § 1983, the Court should remand this case to the courts below for a determination of whether they must entertain a § 1983 claim challenging the validity of a state tax.[133]

CONCLUSION

The decision of the court below, holding that no cause of action exists under § 1983 for violations of the dormant Commerce Clause, should be affirmed. Alternatively, if the Court should determine that § 1983 generally provides a remedy for violations of the dormant Commerce Clause, this action should be remanded to allow the courts below to

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(Continued from previous page)

remedy in compliance with requirements of *McNary*); *Johnston v. Gaston County*, 71 N.C. Ct. App. 707, 712-13, 323 S.E.2d 381, 384 (1984) (same), *review denied*, 313 N.C. 508, 329 S.E.2d 392 (1985); *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 497, 316 S.E.2d 386, 388-89 (1984) (taxpayer may not circumvent state remedies by invoking § 1983), *aff'd by an equally divided Court*, 471 U.S. 82 (1985) (per curium).

[133] Respondents' purpose in presenting this argument should *not* be construed as constituting a lack of faith in the correctness of the Nebraska Supreme Court's decision that the dormant Commerce Clause does not secure rights cognizable under § 1983. Respondents merely seek to apprise the Court of their position that, in the event it should hold that alleged violations of the dormant Commerce Clause are generally cognizable under § 1983, the Court should permit the courts below to consider the *additional* substantial issue of whether Nebraska state courts have an obligation to entertain a § 1983 action in a state tax challenge.

determine whether they are required to entertain a claim under § 1983 in a challenge to a state tax.

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No. 89-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents.

On Writ of Certiorari
to the Supreme Court of Nebraska

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents and *amici* National Conference of State Legislatures, *et al.* ("NCSL") acknowledge, as they must, that the dormant Commerce Clause imposes specific obligations and restraints upon states; among other things, it prohibits a state from imposing greater taxes or more onerous regulations on persons and companies engaging in interstate commerce who are based outside the state than on comparable persons and companies based in the state or engaged

only in intrastate commerce.[1] Respondents[2] also acknowledge that adversely affected persons, such as petitioner, may enforce those obligations and restraints through the courts by obtaining declaratory and injunctive relief and, in some circumstances, monetary redress.[3] *See McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990). Nevertheless, respondents maintain that the Commerce Clause does not secure any "rights, privileges or immunities" in individuals to engage in interstate commerce free of discriminatory state taxes and regulations—at least not within the meaning of 42 U.S.C. § 1983.

The proposition that legally enforceable protections are not legal "rights," "privileges" or "immunities" is one that is certainly at odds with the common understanding and usage of those terms.[4] Sometimes, of course, common understanding must give way to compelling contrary evidence, or to a long and consistent history of contrary precedent or usage. In this case no such evidence or decisional history exists. On

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[1] Resp. Br. 14; NCSL Br. 6-7, n.3.

[2] Respondents and NCSL generally take the same positions and advance the same arguments in their briefs. Unless otherwise specified, references in this Reply Brief to respondents are intended to include NCSL as well.

[3] Resp. Br. 24-25; NCSL Br. 6-7, n.3.

[4] *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977) (referring to and enforcing the plaintiffs' "right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business"). *See also Davis v. Passman*, 442 U.S. 228, 239 (1979), where the Court observed: "The concept of a 'cause of action' is employed specifically to determine who may judicially enforce . . . *rights* or obligations." (emphasis supplied.)

the contrary, respondents' strained arguments not only defy the plain language of the statute but would require this Court to reverse course and to disavow many lines of decisions applying § 1983 and the Commerce Clause and determining individual rights in analogous contexts.

I. INDIVIDUALS ARE THE INTENDED BENEFICIARIES OF THE COMMERCE CLAUSE

Respondents and petitioner agree that the considerations to be applied in determining whether a constitutional or statutory provision establishes "rights, privileges or immunities" enforceable under § 1983 were described in *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444 (1989), where the Court stated:

> In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981). The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-432 (1987). We have also asked whether the provision in question was "inten[ded] to benefit" the putative plaintiff. *Id.*, at 430; *see also id.*, at 433 (O'Connor, J., dissenting) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

110 S. Ct. at 448.[5] Respondents further agree with petitioner that the Commerce Clause satisfies the first two considerations the Court identified—*i.e.*, it creates binding obligations and it is not so vague and amorphous as to be beyond the competence of the judiciary to enforce.[6]

Respondents, however, contend that the Commerce Clause does not satisfy the third consideration the Court identified—and thus does not create "rights" enforceable under § 1983—because, they assert, it was not intended to benefit individuals.[7] Instead, respondents contend that the "primary objective of the Commerce Clause is to ensure national political and economic union"[8] and that it provides only "indirect and incidental benefit[s]" to persons engaged in interstate commerce.[9]

This contention, which appears to be the crux of respondents' and NCSL's arguments, is plainly erroneous on several counts. First, it is simply not true that the Commerce Clause was not adopted for the benefit of individuals. Indeed that contention was directly and expressly rejected in *Morgan v. Virginia*, 328 U.S. 373 (1946), a decision which respondents largely ignore. In upholding an interstate bus passenger's challenge to a state statute requiring racial segregation on interstate buses, the Court stated une-

[5] Resp. Br. 9; NCSL Br. 6-7. NCSL also cites *Wilder v. Virginia Hospital Ass'n*, 110 S.Ct. 2510, 2517 (1990), which reaffirmed and applied the considerations identified in *Golden State*.

[6] Resp. Br. 14, 24-25 & nn. 70, 71; NCSL Br. 6-7 & n.3.

[7] Resp. Br. 11-13; NCSL Br. 6-8.

[8] Resp. Br. 16, NCSL Br. 15.

[9] Resp. Br. 20, 21; NCSL Br. 15.

quivocally: "Constitutional protection against burdens on commerce *is for her benefit* . . . ." *Id.* at 376-377 (emphasis supplied). *See also People of State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160 (1907) (referring to persons entitled to challenge state laws under the Commerce Clause as "belong[ing] to the class for whose sake the constitutional protection is given, or the class primarily protected").

Respondents' contention is also inconsistent with the conclusion implicit in the scores of other cases over the past century and a half in which this Court has upheld the right of individuals to enforce in court the restraints the Commerce Clause imposes on the states. In determining whether private individuals may bring legal actions to enforce constitutional or statutory provisions, the principal consideration the Court applies is whether or not the provision in question was intended to benefit the plaintiff and others similarly situated. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The numerous and consistent decisions of this Court upholding the rights of individuals to enforce the dormant Commerce Clause through private legal actions thus clearly reflect the Court's conclusion that the Commerce Clause was adopted for their benefit.

Second, the dichotomy that respondents posit between the Commerce Clause's alleged purpose to serve the national interest in economic and political union and a purpose to benefit individuals engaged in interstate commerce is a false dichotomy. The fact that constitutional provisions may serve broad national or governmental interests does not mean that they were not also adopted to benefit individual citizens. Indeed the ultimate purpose of the Constitution and each of its provisions was to benefit *people*, not abstractions.

The Court recently made this very point in several closely analogous cases in which it rejected the same kind of dichotomy that respondents posit here. In *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500, 1507 (1989), for example, the Court upheld the right of individuals to seek tax refunds based on the doctrine of intergovernmental tax immunity. Although acknowledging the State's contention that the purpose of the doctrine was to protect governments, the Court said that "it does not follow that private entities or individuals . . . cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary." Similarly, in *United States v. Munoz-Flores*, 110 S.Ct. 1964, 1970 (1990), the Court rejected the argument that separation-of-powers provisions were not adopted to benefit individuals with the observation that " 'the Constitution diffuses power the better to secure [individual] liberty.' " (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 393 U.S. 579, 635 (1952) (Jackson, J., concurring)).

Third, respondents themselves acknowledge that the Commerce Clause does benefit and protect individuals engaged in interstate commerce, but they argue that it still does not create rights because its individual benefits are, assertedly, only "incidental" and were not the "primary" purpose of the Commerce Clause.[10] Whether or not benefitting individuals engaged in commerce was the "primary" purpose of the Commerce Clause is debatable but irrelevant. Nothing in this Court's decisions suggests that whether a provision creates rights turns on whether its purpose to benefit individuals is better characterized as "primary" than as "secondary" or whether its beneficial effects are "direct" or merely "incidental."[11] Any such

[10] Resp. Br. 16, 20.

[11] Respondents and NCSL have cited decisions which have stated or held that a private right of action will not be inferred from a statute if the statute had no purpose to benefit the particular class of whom the plaintiff was a member but was merely intended to benefit the general public and benefitted the plaintiff incidentally only as a member of the general public. Resp. Br. 18, n. 51; NCSL Br. 7 (citing *Golden State, Cort v. Ash*, and *California v. Sierra Club*, 451 U.S. 287 (1981)). These cases do not stand for the proposition that a provision does not create rights if its purpose to benefit a particular class is only one of several purposes but is not its *primary* or *exclusive* purpose, and the proposition for which they are cited has no application here. The class that the Commerce Clause benefits and, as *Morgan* and other cases indicate, was intended to benefit, is not merely the general public but is the particular class of persons who are engaged in interstate commerce. Indeed, the Court has held that unless the plaintiff could show that he was a member of that class, the Court would not consider his challenge to state statutes under the Commerce Clause, no matter how meritorious it might be. *See, e.g., People of State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907).

Equally inapposite are cases cited by respondents and NCSL which have stated that the Commerce Clause " 'protects the interstate market, not particular interstate firms.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978)). Those cases hold that a person or company is not immune from state taxation or regulation merely because it engages in interstate commerce and that a state tax or law that applies equally and without discrimination to all persons is not unconstitutional merely because it happens to fall more heavily on out-of-state persons or on persons engaged in interstate commerce. Those cases do not hold that the Commerce Clause does not protect individuals engaged in interstate commerce clause from discriminatory state taxes or laws—*i.e.*, from laws or taxes that fall more heavily on them *because* they engage in interstate

test, moreover, would engage the courts in an endless exercise of metaphysical and ultimately fruitless hair-splitting. The fact is that most constitutional provisions can be viewed as having multiple purposes and benefits, and which of those was more important than others in the minds of the Framers is simply not determinable.

In sum, the Commerce Clause was intended to benefit not only abstract national interests but also the concrete interests of individuals like petitioner in engaging in interstate commerce free of discriminatory state taxes and regulations. Under all of the factors identified in *Golden State*, therefore, it creates rights, privileges and immunities which may be enforced under 42 U.S.C. § 1983.[12]

II. PETITIONER HAS NOT EQUATED "STANDING" WITH "RIGHTS"

Respondents erroneously assert that petitioner has confused the concept of standing with the concept of rights, and they argue at some length that he has mistakenly contended that a person's standing to invoke the Commerce Clause is equivalent to his having a right secured by the Commerce Clause.[13] Respondents seriously misstate petitioner's argument. Petitioner has never argued that standing alone is equivalent to a right. Obviously, under the test for

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commerce or are from outside the state. Numerous decisions, of course, establish that the Commerce Clause does protect such individuals.

[12] *See* Note, *Dormant Commerce Clause Claims Under 42 U.S.C. §1983: Protecting the Right To Be Free of Protectionist State Action*, 86 Mich. L. Rev. 157 (1987).

[13] Resp. Br. 10-11, 24-32; NCSL Br. 5-9.

standing[14] a person may have standing to assert a right that he or she may ultimately be found not to have. Similarly, a person asserting a non-frivolous claim of right under the Constitution may obtain federal court jurisdiction under 28 U.S.C. § 1331, which provides jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," even though the federal court may ultimately reject his or her claim of right on the merits. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

What petitioner has contended is that, under this Court's decisions, a provision secures individual rights if the individual has standing to invoke the provision *and* if he or she is entitled to relief under it—*i.e.*, if the person may not only invoke the provision but also enforce it. *See* Pet. Br. 24-26. In short, standing is a necessary but not sufficient element of what constitutes an individual right. Petitioner's contention that the Commerce Clause secures individual rights is based on the many cases holding that individuals may not only assert the protections of the Commerce Clause but also enforce them.[15]

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[14] *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396 (1987); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (whether the plaintiff's claim is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

[15] Since petitioner has never contended otherwise, respondents' argument that cases like *Carter v. Greenhow*, 114 U.S. 317 (1885), and *Bowman v. Chicago & Northwestern Ry. Co.*, 115 U.S. 611 (1885), show that standing to assert a claim and the ability to obtain federal jurisdiction under 28 U.S.C. § 1331 do not establish the existence of an enforceable right (Resp. Br.

In this regard, respondents are also seriously mistaken in characterizing and dismissing *Boston Stock Exchange* and *Morgan v. Virginia* as having done nothing more than establishing the standing of certain plaintiffs to challenge state actions under the Commerce Clause.[16] Those cases did not merely uphold the standing of the plaintiffs to assert the Commerce Clause; they upheld the plaintiffs' claims on the merits and enforced what the Court in *Boston Stock Exchange* expressly referred to as their "right under the Commerce Clause" to engage in interstate commerce

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26-28) is simply irrelevant to the question at issue.

Nor is there any merit to respondents' and NCSL's contention that *Carter* and *Bowman* support their claim that the Commerce Clause does not create "rights" within the meaning of § 1983. Resp. Br. 29; NCSL Br. 26-28. *Carter* did not involve the Commerce Clause at all, but concerned the Contracts Clause of Article I, § 10. Moreover, the Court did not hold that the Contracts Clause did not secure rights to individuals but simply that the plaintiff had failed to allege a deprivation of those rights. Indeed, the Court held that that Clause does secure individual rights, namely, the right to a judicial determination of the invalidity of a contractual impairment, but stated: "But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it." 114 U.S. at 322. Justice Stone thus accurately described *Carter* as having rejected the plaintiff's claim "as a matter of pleading." *Hague v. CIO*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.).

In *Bowman*, the Court did not indicate which provision of the Constitution was asserted, but in any event it simply held that the plaintiff's suit against a railroad for refusal to carry his goods was based on his rights under the state law of common carriage, not on any rights under the Constitution. 115 U.S. at 615.

[16] Resp. Br. 24; NCSL Br. 17.

free of discriminatory state taxes and laws. 429 U.S. at 320 n.3.

Nor is there any substance to NCSL's attempt (NCSL Br. 16) to dismiss the references in *Boston Stock Exchange*, *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), *Western Union Tel. Co. v. State of Kansas*, 216 U.S. 1, 21 (1910), and *United States v. Guest*, 383 U.S. 745, 757, 760 (1966), to the "rights" of individuals under the Commerce Clause as merely a description of "rights" in other contexts but not a determination of "rights" within the meaning of § 1983. In other words, according to NCSL, what may be a "right" generally or in other contexts is not a "right" under § 1983. There is no basis in the legislative history of § 1983 or in this Court's decisions, however, for concluding that Congress intended a specialized meaning for the term "rights" in § 1983 that is different from and significantly narrower than the meaning of that term in other contexts. NCSL's effort to engraft a unique vocabulary onto § 1983 jurisprudence is without merit.[17]

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[17] Respondents make a similar but equally baseless attempt to distinguish cases like *United States v. Munoz-Flores*, *Davis v. Michigan Dep't. of Treasury* and *Bowsher v. Synar*, 478 U.S. 714 (1986). As discussed in petitioner's opening brief (Pet. Br. 26-29), those cases held that other constitutional provisions and doctrines allocating governmental powers created enforceable "individual rights." *See Munoz-Flores*, 110 S.Ct. at 1970. Respondents distinguish those cases on the ground that they did not involve claims under § 1983 (Br. 24, n.68), but respondents do not explain why the term "rights" as used in §1983 has a different meaning from the term this Court has used to describe individual protections under the Origination Clause, Art. I, § 7, cl. 1, or other separation of powers provisions and doctrines.

Finally, NCSL is simply wrong in contending (Br. 26) that "[i]f petitioner is correct in contending that plaintiffs may rely on Sections 1983 and [28 U.S.C. §] 1343(3) whenever they have standing to challenge a violation of the Constitution, the federal question statute would have been unnecessary (and the jurisdictional amount requirement nugatory) from the outset, at least in constitutional litigation." Section 1331 of Title 28 gives federal courts jurisdiction over any claim of right arising under the Constitution and federal laws, regardless of the parties involved. Section 1983, in contrast, was enacted as a special remedy for certain limited kinds of constitutional and statutory violations—those committed under color of state law—and § 1343(3) was enacted to give federal courts jurisdiction only over those types of violations.[18] Section 1331 was necessary to provide jurisdiction over all the many other controversies involving federal questions.

III. CONGRESS' POWER UNDER THE COMMERCE CLAUSE DOES NOT PRECLUDE PETITIONER'S RIGHTS UNDER THAT CLAUSE

Respondents also argue that individuals can have no "rights" under the dormant Commerce Clause because Congress has the power to alter or abolish those rights.[19] This argument is meritless. In the absence of legislation by Congress, individuals have an enforceable right under the Commerce Clause to engage in interstate commerce free of discriminatory state

[18] Furthermore, § 1343(3) gives jurisdiction only with respect to violations of certain kinds of federal statutes—those "providing for equal rights."

[19] Resp. Br. 21; NCSL Br. 10.

taxes and regulations. The fact that existing rights to engage in a particular activity or to be free of particular restraints may be subject to alteration by Congress in the future does not make them any the less "rights" within the meaning of § 1983. Indeed, all federal statutory rights that are actionable under § 1983 against state violators are subject to future alteration or repeal by Congress.[20]

IV. THE LEGISLATIVE HISTORY OF § 1983 DOES NOT SUPPORT RESPONDENTS

Respondents' reliance on the legislative history of § 1983 rests mainly on certain remarks of Representative Shellabarger.[21] Petitioner addressed these in his opening brief (Pet. Br. 33-34) and will repeat only one point here for emphasis. *Nowhere* in his remarks did Representative Shellabarger make any reference to the Commerce Clause, and there is no basis for imputing to him or to any other legislator the view that state violations of the Commerce Clause, such as the segregation law struck down in *Morgan v. Virginia*, would not be redressable under § 1983.

Respondents' claim (Br. 39-40) that "postenactment history" supports their position is groundless. The 1980 legislation respondents refer to had no connec-

[20] The same is true of many constitutional provisions. Even though individuals may not have an absolute right to engage in a particular activity, they have a constitutional right to the legislative and judicial processes that the Constitution requires as a condition of regulating or prohibiting that activity. For example, aliens have no absolute right not to be deported, but they do have a right not to be deported except by legislation enacted pursuant to constitutional requirements. *INS v. Chadha*, 462 U.S. 919 (1983).

[21] Resp. Br. 33-35; NCSL Br. 23-24.

tion with § 1983 but merely eliminated the $10,000 amount in controversy requirement of 28 U.S.C. § 1331 in federal question cases. Respondents base their argument entirely on a passing remark by Professor Charles Wright in one of the letters supporting the legislation.[22] Contrary to respondents' assertion, however, Professor Wright did not state that "there was a serious doubt" that a Commerce Clause claim could be brought under 28 U.S.C. § 1343. He merely stated that, as one of many reasons for eliminating the jurisdictional amount requirement in § 1331, "it is not yet clear" that such an action could be brought under § 1343. The notion that Congress eliminated the jurisdictional amount requirement in § 1331 because of this remark or because of any doubts about federal court jurisdiction over Commerce Clause claims under $10,000 is simply fanciful.

V. RESPONDENTS' POLICY ARGUMENTS ARE WRONG AND ARE ADDRESSED TO THE WRONG FORUM

Respondents and NCSL advance a number of policy arguments to the effect that recognition of a cause of action under § 1983 for Commerce Clause violations is unnecessary and/or undesirable. These arguments are both incorrect and addressed to the wrong forum. If Congress wishes to limit the scope of §§ 1983 or 1988 it may. To date, however, Congress has chosen not to alter this Court's consistently broad construction of those statutes.

1. Respondents argue that § 1983 is unnecessary to ensure adequate enforcement of the Commerce Clause because Commerce Clause claims have been litigated many times without § 1983 and because those claims

[22] *See* S. Rep. No. 827, 96th Cong., 2d Sess. 12-16 (1980).

are "generally economic in nature" and are asserted on behalf of "business interests" who "do not need the economic incentive of attorneys fees to prosecute Commerce Clause claims."[23] In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 (1972), however, this Court squarely rejected the contention that § 1983 only applied to "personal" rights, and not to "economic" or "property" rights. Furthermore, Commerce Clause claims do not always involve solely economic interests, as *Morgan v. Virginia* shows.

The fact that Commerce Clause claims have been litigated previously without reliance on § 1983 is plainly irrelevant. Many other constitutional and statutory rights that this Court has held to be enforceable under § 1983 have also been litigated and vindicated without resort to that provision. Respondents' opinion that Commerce Clause claimants do not need the incentive of the attorneys' fees provided by § 1988 is both groundless and irrelevant. In cases like this one, where the monetary impact on each individual is relatively small and where state procedures foreclose the recovery of fees from the benefitted class, the availability of fees can well determine the feasibility of bringing legal action to vindicate one's rights. Moreover, whether or not business associations, civil rights organizations or other public interest groups might undertake litigation against constitutional and statutory violators even without the possibility of recovering their fees is immaterial to the scope of § 1983. Congress enacted § 1988 not only to help ensure the private vindication of federal rights but also to fully redress persons for all of the costs resulting from the violation of those rights.

[23] Resp. Br. 40, 43.

2. Respondents' claim that § 1983 would impose substantial and undue burdens on states is also incorrect. The only additional cost such a result would impose on states is the legal expenses that their unconstitutional actions required people to incur to protect constitutional rights. That burden is minimal. In this case, it would serve only to reduce by a small fraction the profit that Nebraska managed to make by collecting unconstitutional retaliatory taxes during the five years the suit was pending in its courts.[24]

Nor is there any basis for NCSL's claim (Br. 29-30) that recognizing a § 1983 cause of action will dramatically change the character of Commerce Clause litigation. Recognizing a § 1983 cause of action will not expose states and state treasuries to damages,[25] and will have no effect on where Commerce Clause claims are litigated. The Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, will bar federal courts from entertaining many, if not most Commerce Clause claims, and where they do not apply federal courts would have jurisdiction under 28 U.S.C. § 1331 regardless of § 1983. Furthermore, contrary to NCSL's claim (Br. 30), § 1983 does not prevent states from applying "neutral state rules" with respect to constitutional challenges to state taxes in

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[24] Respondents' suggestion that the prospect of personal liability under § 1983 will deter state officials from "adopting innovative policies" (Resp. Br. 44) is also baseless. Individuals are shielded from personal liability by the doctrine of qualified immunity for actions taken in good faith and they should not be shielded from those taken in bad faith.

[25] *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989).

state courts. *Howlett v. Rose*, 110 S.Ct. 2430, 2440 (1990).

VI. THERE IS NO WARRANT FOR REMANDING THE § 1983 ISSUE TO THE NEBRASKA SUPREME COURT

Finally, respondents have contended that if this Court concludes that Commerce Clause challenges to state taxes are "generally cognizable" under § 1983, it should remand the case to the Nebraska courts for them to consider whether they are required to entertain the § 1983 claim.[26] Such a remand is unwarranted for two reasons. First, contrary to respondents' claims, this Court squarely held last term in *Howlett v. Rose* that state courts are required to entertain § 1983 claims unless they are barred by some "neutral state rule regarding the administration of the courts," such as the doctrine of *forum non conveniens*. Respondents have not suggested any neutral state rule that might have barred the § 1983 claim in this or any other similar case. They have only suggested that the Nebraska courts might not wish to enforce the federal remedies, which is a motive that this Court in *Howlett* held to be impermissible. 110 S.Ct. at 2445.[27]

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[26] Rep. Br. 45-49.

[27] Although respondents cite *Howlett*, they appear to have overlooked its clear holding that "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'" 110 S.Ct. at 2439 (quoting *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 387-388 (1929)). Although respondents cite *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987), as indicating that the question remained open whether state courts are required to entertain § 1983 claims, that question was answered unequivocally in *Howlett*. It may also be noted that on

Second, the Nebraska Supreme Court itself has specifically held that its courts will entertain § 1983 actions and that state sovereign immunity is not a bar to such actions. *Maldonado v. Nebraska Department of Public Welfare*, 223 Neb. 485, 391 N.W.2d 105, 110 (1986).

CONCLUSION

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

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remand in *Ragland* the Arkansas Supreme Court held that it would entertain the § 1983 claim and remanded the case to the trial court for determination of attorneys' fees pursuant to § 1988. *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402, 403 (1987).

No. 89-1555

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK E. DENNIS, PETITIONER

v.

MARGARET L. HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, ET AL., RESPONDENTS

On Writ of Certiorari to the Supreme Court of Nebraska

BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a claim that state action discriminates against interstate commerce in violation of the Commerce Clause is cognizable under 42 U.S.C. § 1983.

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICUS CURIAE

American Trucking Associations, Inc. (ATA) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. ATA and its members frequently invoke 42 U.S.C. § 1983 in litigation challenging state action that deprives them of their right under the Commerce Clause to engage in interstate commerce free of unreasonable burdens and unlawful discrimination. See, *e.g.*, *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987); *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *A.B.F. Freight System, Inc.* v. *Suthard*, 681 F. Supp. 334 (E.D. Va. 1988); *Commonwealth of Kentucky Transp. Cabinet* v. *American Trucking Associations, Inc.*, 746 S.W.2d 65 (Ky. 1988). They accordingly have a substantial interest in ensuring that the remedy set forth in 42 U.S.C. § 1983, and the con-

comitant entitlement to attorneys' fees under 42 U.S.C. § 1988, extend to violations of that constitutional right. ATA filed an amicus curiae brief in *Lewis* v. *Continental Bank Corp.*, 110 S. Ct. 1249 (1990), addressing the question whether Commerce Clause claims are cognizable under Section 1983.[1]

SUMMARY OF ARGUMENT

A. The language of 42 U.S.C. § 1983 is exceedingly broad. The statute provides a remedy whenever state action deprives a person of "*any* rights, privileges, or immunities secured by the Constitution and laws" of the United States (emphasis added). That expansive language plainly encompasses claims grounded in violations of the Commerce Clause. State action that transgresses the Commerce Clause's limitations upon state power deprives persons of their right to be free of burdensome or discriminatory state regulation not authorized by Congress.

Nothing in the legislative history of Section 1983 suggests a different conclusion. The consistent theme of the legislative debates was that Congress intended to safeguard *all* of the rights conferred by the Constitution by creating a federal court remedy for violations of those rights. The legislative history thus confirms that the statute should be interpreted in accordance with its plain language.

B. Despite the broad wording of Section 1983 and the evidence of expansive congressional intent, some lower courts have concluded that Commerce Clause claims fall outside the scope of Section 1983 because in their view the Commerce Clause does not secure "rights" within the meaning of the statute. That view is somewhat puzzling. No one contends that the Clause's limitations upon state authority are merely precatory or advisory; all agree

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.

that the Clause establishes binding restrictions that may be enforced by injured parties such as petitioner in actions seeking injunctive or declaratory relief. The contention appears to be that the Commerce Clause confers a "second-class" right, sufficiently concrete to be enforced in some kinds of judicial actions, but not concrete enough to be cognizable under Section 1983.

These courts have attempted to justify their exclusion of Commerce Clause claims from Section 1983 by characterizing the Commerce Clause as a "structural" provision of the Constitution that allocates regulatory authority between the federal government and the states, but does not protect individual rights. The flaw in this argument is the rather simplistic assumption that provisions of the Constitution may be divided into two separate groups, those that serve structural ends and those that protect individuals. In fact, the Framers considered the Constitution's structural provisions to be the principal source of protection for individual rights. Dividing authority between the states and the federal government (and dividing federal authority among three separate branches) would " 'diffuse[] power the better to secure liberty.' " *United States* v. *Munoz-Flores*, 110 S. Ct. 1964, 1970 (1990) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

The Commerce Clause thus serves structural ends, allocating regulatory authority between the states and the federal government, and protects personal rights as well, both indirectly (by diffusing authority) and directly (by freeing individuals from discriminatory or burdensome state regulation not authorized by Congress). This Court has recognized as much, frequently adverting to the "right" to engage in interstate commerce. And the historical record indicates that the Framers adopted the Commerce Clause to protect individuals from unfair regulation by the states.

The rights conferred by the Commerce Clause affect the liberty of American citizens to transact business on a national scale, free from burdens imposed by local legislatures that may be beholden to narrow, parochial interests. These rights are fundamental to the national citizenship the Constitution was established to secure. They surely are protected by Section 1983.

ARGUMENT

SECTION 1983 ENCOMPASSES CLAIMS SEEKING REDRESS FOR VIOLATIONS OF THE COMMERCE CLAUSE

A. The Statutory Language And Legislative History Establish That Section 1983 Extends To Commerce Clause Claims.

The starting point for all questions of statutory interpretation is the language of the statute. The language of Section 1983 makes clear that the provision encompasses claims grounded in the Commerce Clause. The statute's legislative history confirms that conclusion, establishing that Congress created a broad remedy for violations of all rights conferred by the Constitution.

1. Section 1983 provides a remedy when a person acting under color of state law deprives the plaintiff of "*any* rights, privileges, or immunities secured by the Constitution and laws" of the United States (emphasis added). The term "any" generally means a thing "selected without restriction or limitation of choice." When used as a modifier, as in Section 1983, "any" indicates "the maximum or whole of a number or quantity." *Webster's Third New International Dictionary* 97 (1986). Congress's choice of words establishes that this remedial statute has the widest possible compass. "It is difficult to imagine broader language." *United States* v. *James*, 478 U.S. 597, 604 (1986).

Any lingering doubt about the very broad scope of Section 1983 may be put to rest by comparing it to another provision of federal law whose breadth cannot be doubted

—the statute governing this Court's jurisdiction to review state court judgments that rest on federal law. As it stood at the time Section 1983 was enacted, that statute authorized review by this Court in three categories of cases, one of which was cases in which "any title, right, privilege, or immunity [has been] claimed under the constitution," a federal law, or a treaty, and the decision was against the federal right. See Judiciary Act of 1789, 1 Stat. 73, 85, as amended by the Act of Feb. 5, 1867, 14 Stat. 385, 386. This language, which has been retained in the present-day statute (see 28 U.S.C. § 1257), closely resembles Section 1983's reference to "any rights, privileges, or immunities secured by the Constitution and laws." This part of the jurisdictional statute has long been recognized as exceedingly broad, permitting the Court to review decisions with respect to any conceivable constitutional claim, including one under the Commerce Clause. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 115 (6th ed. 1986). The parallel language of Section 1983 should therefore be interpreted to provide a remedy for the violation of all rights conferred by the Constitution.

Indeed, this Court already has concluded that Section 1983 "must be given the meaning and sweep that * * * [its] language dictate[s]"; the remedy extends to rights secured by "*all* of the Constitution and laws of the United States." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 & n.16 (1972) (emphasis in original) (quoting *United States* v. *Price*, 383 U.S. 787, 797 (1966)). See also *Golden State Transit Corp.* v. *City of Los Angeles*, 110 S. Ct. 444, 448 (1989) ("[w]e have repeatedly held that the coverage of [Section 1983] must be broadly construed"); *Monell* v. *Department of Social Services*, 436 U.S. 658, 700 (1978) ("there can be no doubt that [Section 1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights"); *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 663 (1979) (White,

J., concurring) (Section 1983 "protect[s] against state invasions of *any* and *all* constitutional rights") (emphasis in original).

The language of the statute, the clearest guide for ascertaining Congress's intent, thus establishes that Congress intended to encompass all claims alleging violations of rights secured by the Constitution—including those grounded in the Commerce Clause—within the scope of Section 1983. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6-8 (1980) (refusing to limit Section 1983's plain language).[2]

2. The breadth and clarity of the text of Section 1983 eliminate any need to consult the provision's legislative history. See *Davis* v. *Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1504 n.3 (1989) ("[l]egislative history is irrelevant to the interpretation of an unambiguous statute"); *United States* v. *Ron Pair Enterprises*, 109 S. Ct. 1026, 1030 (1989) ("where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms' ") (citation omitted); *United States* v. *Locke*, 471 U.S. 84, 95-96 (1985). In any event, the legislative history simply confirms that Congress meant what it said when it enacted Section 1983.

There was no suggestion when Section 1983 was enacted that some constitutional rights were to be excluded from the statutory remedy. Rather, the consistent theme of the legislative debate was that Congress intended to create a general remedy for violations of rights secured by the Constitution. One Congressman stated:

[2] Respondents assert (Br. in Opp. 9) that the Commerce Clause does not create "rights" because its express language does not limit state power, but this Court recently rejected the indistinguishable argument that implied statutory rights are excluded from Section 1983. *Golden State*, 110 S. Ct. at 451 ("[t]he violation of a federal right that has been found to be implicit in a statute's language and structure is as much a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute").

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject-matter of this bill. *They are not defined in it, and there is no attempt in it to put limitations upon any of them*; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law. The purpose of this bill is, if possible, and if necessary, to render the American citizen more safe in the enjoyment of those rights, privileges, and immunities.

Cong. Globe, 42d Cong., 1st Sess. 475 (1871) (Rep. Dawes) (emphasis added). See also *id.* at App. 68 (Rep. Shellabarger); *id.* at App. 81 (Rep. Bingham); *Monell*, 436 U.S. at 683-686 (summarizing legislative history).

Congress expressly recognized that the remedy provided by Section 1983 would extend to violations of the protections set forth in the original Constitution as well as those conferred by the Bill of Rights and the Fourteenth Amendment. Representative Dawes observed that the Constitution adopted in 1789 secured rights, privileges, and immunities "so peculiar that [the American citizen] stood before the world a wonder and a marvel among all the nations of the earth." Cong. Globe, 42d Cong., 1st Sess. 475 (1871). He stated that "when, *in addition to those privileges and immunities thus secured to him*," one added the protections secured by the amendments to the Constitution, he could "hardly comprehend[] the full scope and measure of the phrase which appears in this bill." *Ibid.* (emphasis added). These comments make clear that the statute extended to both sets of constitutional protections.

Other legislators also referred to provisions of the original Constitution in describing the scope of the statute. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 486 (1871) (Rep. Cook) (discussing the Contracts Clause). Most significantly, nothing in the legislative history in-

dicates that Congress intended to treat rights conferred by the original Constitution in general, or the Commerce Clause in particular, any differently from those granted by other provisions of the Constitution.

There is no doubt that Congress's immediate concern—and the principal focus of the legislative debate—was the need to provide a remedy for the southern States' failure to protect the newly-freed slaves against racially-based violence instigated by the Ku Klux Klan. But, contrary to the view of some lower courts (see, *e.g.*, *Consolidated Freightways Corp.* v. *Kassel*, 730 F.2d 1139, 1145-1146 (8th Cir.), cert. denied, 469 U.S. 834 (1984)), that fact does not "create a 'negative inference' limiting the scope of [Section 1983] to the specific problem that motivated its enactment." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983); see also *Eli Lilly & Co.* v. *Medtronic, Inc.*, 58 U.S.L.W. 4838, 4840 n.2 (U.S. June 18, 1990); *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361, 371 (1986). Congress's choice of general language, together with the legislative history evidencing Congress's broader intent, establish that Congress intended to give the statute a wider compass.

Some courts have excluded Commerce Clause claims from Section 1983 in reliance on a single comment by Representative Shellabarger, one of the principal sponsors of the statute, arguing that because he distinguished between those provisions of the Constitution that "restrain and directly relate to the States" and those provisions that "relate directly to the rights of persons within the States," his statement establishes that Section 1983 provides a remedy only for violations of the latter category of constitutional provisions. See, *e.g.*, *Consolidated Freightways*, 730 F.2d at 1146 n.16. Viewed in the context of the debate, however, it is clear that Representative Shellabarger was not describing a limitation upon the scope of Section 1983.

First, Representative Shellabarger was not even discussing the part of the 1871 statute that contained the predecessor of Section 1983. He had completed his discussion of that portion of the bill (see Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871)), which was contained in Section 1, and turned to Section 2, which made it a federal crime to engage in a conspiracy "to do any act in violation of the rights, privileges, or immunities of another person" that would constitute a federal crime in places under the exclusive jurisdiction of the United States. This provision differed from Section 1983 in that it was not limited to rights, privileges, and immunities created by the Constitution; Representative Shellabarger explained that Section 2 was intended to reach beyond the rights recognized directly in the Constitution to protect the "fundamental rights" that "inhere in citizenship," apparently on the theory that these rights were protected by the Privileges and Immunities Clause. *Id.* at App. 69.

A principal objection to the provision was that Congress lacked the power to enact it, because it infringed upon the powers reserved to the states by overriding their authority to define and punish crimes. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 45 (1871) (Rep. Kerr). In responding to this argument, Representative Shellabarger contended that Congress had the power to enforce by legislation all provisions of the Constitution. *Id.* at App. 69 ("Congress is bound to execute, by legislation, every provision of the Constitution, even those provisions not specially named as to be so enforced"). Representative Shellabarger argued that the federal government had always assumed that it possessed the power to enforce the parts of the Constitution that did not expressly confer enforcement authority upon Congress. He recognized, in the passage seized upon in support of the narrow construction of Section 1983, that "[m]ost of the provisions of the Constitution which restrain and directly relate to the States" had been enforced by the courts without federal legislation. *Ibid.*; see also *id.* at App. 70 (absence of prior legislation reflected fact that

it had been deemed unnecessary, not that Congress lacked the power to adopt it). But he noted that other constitutional provisions limiting state authority—the Extradition Clause, the Privileges and Immunities Clause, and the Fugitive Slave Clause—had been enforced by federal legislation. *Id.* at App. 69-70.

This affirmation of *broad* congressional power to create remedies for violations of constitutional rights provides no grounds for a *narrow* interpretation of Section 1983. Representative Shellabarger's comments had nothing to do with his view of the scope of Section 1983; they were an effort to show why the historical record supported his theory that Congress had the power to enforce all of the Constitution's limits on state authority. His statement that Congress in the past had found it unnecessary to enact statutory remedies for violations of some of these provisions does not provide any support for the view that the Congress that enacted Section 1983 intended to limit the scope of that new remedy. Indeed, to the extent it is relevant at all, Representative Shellabarger's comment reveals an expansive view of Congress's role in providing remedies for violations of constitutional rights that supports a broad interpretation of Section 1983.

Even if this "fragment[] of legislative history" could be read to provide some support for a narrow interpretation of the statute, and we believe it does not, it plainly does not constitute "a clearly expressed legislative intent contrary to the plain language of the statute." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 75 (1982); see also *United States* v. *James*, 478 U.S. at 612. "[I]f Congress had intended to limit [the statute's] scope * * * it is not unreasonable to assume that it would have made this [limitation] explicit." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 550 (1978). When a party invokes legislative history to justify limiting statutory language that is "broad and unqualified," the legislative history must provide "substantial support for limiting language that Congress itself chose not to limit." *Ibid.*

(footnote omitted). The legislative history of Section 1983 falls far short of this standard and accordingly does not justify excluding Commerce Clause claims from the unqualified scope of the statute.

3. Finally, nothing in this Court's precedents supports excluding Commerce Clause claims from Section 1983. Some have suggested that the Court in *Carter* v. *Greenhow*, 114 U.S. 317 (1885), held that the Contracts Clause does not secure rights within the meaning of Section 1983. See 87-1955 U.S. Am. Br. 19 n.19. Even if this characterization of the decision were correct, *Carter* would shed little light upon whether Section 1983 encompasses claims under an entirely different provision of the Constitution. In fact, however, *Carter* does not stand for that proposition.

The plaintiff in *Carter* sought to vindicate the contractual right, conferred by an 1879 state statute, to pay his state taxes with coupons from state bonds. The state refused to accept the coupons, relying on a subsequently-enacted statute that eliminated the payment right. This Court observed that "[t]he rights alleged to be violated are the right to pay taxes in coupons instead of in money, and, after a tender of coupons, the immunity from further proceeding to collect such taxes as though they were delinquent. These rights the plaintiff derives from the contract with the State, contained in the [1879 statute] and the bonds and coupons issued under its authority." 114 U.S. at 322. Because the plaintiff framed the case in this manner, bringing the Contracts Clause into play only in response to the State's argument that a subsequent statute altered the plaintiff's rights under the 1879 statute, the Court concluded that the plaintiff had not alleged the deprivation of a right secured by the Constitution. As Justice Stone later observed, *Carter* "held *as a matter of pleading* that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to

him by that clause of the Constitution' [the contract clause], to which he had 'chosen not to resort.'" *Hague* v. *CIO*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.) (emphasis added); see also *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. at 613 n.29 (relying on Justice Stone's explanation of *Carter*).

The same analysis applies to *Bowman* v. *Chicago & Northwestern Ry.*, 115 U.S. 611 (1885). It is not even clear which provision of the Constitution was implicated in that case, because the Court's opinion is silent on that question. In any event, the decision rests on the same pleading technicality as *Carter*. Because the plaintiff alleged a violation of a right conferred by state law and did not allege the deprivation of rights secured by the Constitution, he failed to state a claim under Section 1983. See *Chapman*, 441 U.S. at 658-659 n.27 (White, J., concurring) (claims in *Carter* and *Bowman* were dismissed because the particular rights alleged to have been infringed were not secured by federal law).

In sum, the language of Section 1983, the legislative history, and this Court's prior interpretations of that statute all strongly favor construing Section 1983 to encompass claims resting on violations of the Commerce Clause.

B. The Commerce Clause Creates "Rights" Within The Meaning Of Section 1983.

Some lower courts have concluded that Commerce Clause claims are not enforceable under Section 1983 because the Clause does not confer "rights" within the meaning of that statute. See Pet. App. 5a-18a (discussing decisions). Even if these courts were correct, Commerce Clause claims would not be excluded from Section 1983, because the statute prohibits the deprivation of "rights, privileges, or immunities secured by" federal law. The Commerce Clause surely confers a federal "privilege" to engage in interstate commerce free of burdensome or discriminatory state regulation and a federal "immunity" from such state regulation. In any event, the benefits conferred by the Commerce Clause do qualify as constitutional rights cognizable under Section 1983.

Even the courts that deny that the Commerce Clause creates "rights" do not and could not dispute that the Commerce Clause creates enforceable obligations, for it is settled that a plaintiff may obtain injunctive relief on the basis of a claim grounded in the Commerce Clause. Compare *Wright* v. *City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987) (a statute does not create rights within the meaning of Section 1983 when the statute "indicat[es] no more than a congressional preference—at most a 'nudge in the preferred directio[n],' * * * not * * * ris[ing] to the level of an enforceable right") (citation omitted). Indeed, petitioner obtained such relief in this case. See Pet. App. 3a.

Rather, the view of these courts is that the Commerce Clause simply allocates power between the federal government and the states. Any benefit to individuals as a result of this division of auhtority is "incidental," and therefore too attenuated to give rise to a right enforceable under Section 1983. That conclusion is wrong for several reasons.

1. The well-settled principle that individuals injured by state action violative of the Commerce Clause may obtain injunctive and declaratory relief (see *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)) establishes that Commerce Clause claims also may be maintained under Section 1983. These individuals are entitled to sue for injunctive relief because they are the beneficiaries of a cause of action implied directly under the Commerce Clause. The existence of that implied cause of action, in turn, reflects the determination that such persons are "appropriate part[ies] to invoke the power of the courts" to remedy violations of the rights conferred by the Commerce Clause. "The concept of a 'cause of action' is employed specifically to determine who may judicially en-

force * * * rights or obligations." *Davis* v. *Passman*, 442 U.S. 228, 239 (1979); see also *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring) ("a federal court's power to grant even equitable relief [in nondiversity cases] depends on the presence of a substantive right derived from federal law").

Recognition of an implied cause of action for injunctive relief establishes that the relationship between the limits on state authority imposed by the Commerce Clause and the injuries suffered by an individual from a State's violation of those limits is sufficient to permit that individual to bring suit to vindicate the constitutional right. Because such persons are thus within "the class of litigants * * * [that] may use the courts to enforce the right at issue" (*Davis*, 442 U.S. at 240 n.18), they should be entitled to bring suit under Section 1983 as well.

To be sure, Congress could have limited the right to sue under Section 1983 to a class of persons narrower than that entitled to sue directly under the Constitution, but there is no evidence that Congress did so. Certainly this Court has never recognized such a limitation on the scope of Section 1983. And the statute's broad language provides no justification for that result. It imposes liability on every person who "subjects" another to "the deprivation of any" right "secured by the Constitution * * *." Section 1983 does not by its terms require any special relationship between the injured party and the constitutional right.[3]

Moreover, construing the statute to limit the class of potential plaintiffs would be inconsistent with its purpose. Section 1983 was intended to provide a federal

[3] For example, liability under the statute is not limited to persons who deprive another of an "individual" right or of a right secured "to him" by the Constitution.

forum for the vindication of federal rights because Congress believed that the state courts were either unwilling or unable to provide for effective enforcement of those rights. See *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304, 2309 (1989); *Felder* v. *Casey*, 487 U.S. 131, 147 (1988); *Patsy* v. *Board of Regents*, 457 U.S. 496, 503, 506-507 (1982). Congress could not have intended to create a federal forum for all federal rights other than those conferred by the Commerce Clause, relegating the latter to the very state courts that had proven themselves inhospitable to federal claims. But, under the narrow construction of Section 1983 adopted by the Nebraska Supreme Court, a plaintiff asserting a claim under the Commerce Clause in 1872 would have had to bring his lawsuit in state court. See Br. in Opp. 11-12.[4] That result is squarely inconsistent with Congress's purpose in enacting Section 1983. The fact that the Commerce Clause indisputably confers a right on petitioner sufficient to permit him to maintain an implied action directly under the Commerce Clause thus establishes that the Commerce Clause grants "rights" actionable under Section 1983.

This Court's decision in *United States* v. *Guest*, 383 U.S. 745 (1966), provides strong support for the conclusion that the Commerce Clause confers rights cognizable under Section 1983. One question in that case was whether an indictment charging a conspiracy to deprive citizens of the "right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce" stated a violation of 18 U.S.C. § 241, which criminalizes conspiracies to intimidate the exercise of "any right or privilege secured * * * by the Constitution." Relying principally upon the Commerce Clause as the source of the constitutional right to travel, the Court upheld the indictment on

[4] The federal courts were not granted general federal question jurisdiction until 1875. Act of March 3, 1875, § 1, 18 Stat. 470.

the ground that it alleged a conspiracy to deprive citizens of a right secured by the Constitution. 383 U.S. at 757-759. *Guest* confirms that the Commerce Clause secures rights cognizable under Section 1983.

2. Excepting Commerce Clause claims from Section 1983 is wrong for the additional reason that the distinction between "structural" and "individual" rights is wholly illusory. Indeed, the Court rejected such a categorical distinction in its decision last Term in *Golden State Transit Corp.*, holding that a preemption claim—another type of federal right that the lower courts had labeled "structural"—was cognizable under Section 1983. The same result is appropriate here. The Framers did not protect interstate commerce out of whim or caprice; they intended to insulate individuals engaged in interstate commerce against discriminatory and unreasonable state action in the same way that other provisions of the Constitution protect individuals against various categories of government action. That important protection certainly constitutes a right within the meaning of Section 1983.[5]

The fundamental flaw in the argument is the assumption that each provision of the Constitution may be described as either creating rights or as allocating authority in order to serve structural ends, but not both. In fact, of course, a single provision of the Constitution can serve both purposes at the same time. For example, the protection of the Free Speech Clause typically is viewed as conferring a personal right, but the right also is a

[5] This Court's determination in *Golden State* that the Supremacy Clause does not create rights enforceable under Section 1983 has no bearing on the status of Commerce Clause rights. The Supremacy Clause "'is not a source of any federal rights'; it 'secure[s] federal rights by according them priority whenever they come in conflict with state law.'" *Golden State*, 110 S. Ct. at 449 (citation and quotation marks omitted). The Commerce Clause, by contrast, is indisputably a source of substantive federal rights. Indeed, it was the source of the right that led to the invalidation of the state tax statute challenged by petitioner in this case. Pet. App. 3a.

structural one, securing robust political debate in order to promote the political well-being of the Nation.

The same is true of the Constitution's more explicitly structural provisions: "the Constitution diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The distribution of powers between the states and the federal government, and among the branches of the federal government, was intended in large part to protect against majoritarian tyranny. See *The Federalist* No. 51, at 321 (J. Madison) (Mentor ed. 1981); *The Federalist* No. 84, at 515 (A. Hamilton). This Court has recognized that the separation of powers doctrine protects individual rights. *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986); see also *Synar* v. *United States*, 626 F. Supp. 1374, 1403 (D.D.C.), aff'd sub nom. *Bowsher* v. *Synar*, 478 U.S. 714 (1986).

Just last Term the Court squarely rejected a similar argument about "structural" rights, refusing to hold that "compliance with the Origination Clause is irrelevant to ensuring individual rights." *United States* v. *Munoz-Flores*, 110 S. Ct. 1964, 1970 (1990). The Court observed that the Framers divided functions between the two Houses of Congress on the basis of the "differing characteristics of the entities," but that "[a]t base, * * * the Framers' purpose was to protect individual rights." *Ibid.* The power to raise revenue was allocated to the "'immediate representatives of the people'" because it was "'the most complete and effectual weapon'" for obtaining "'a redress of every grievance, and for carrying into effect every just and salutary measure.'" *Ibid.* (citation omitted). The Court concluded that "[p]rovisions for the separation of powers within the Legislative Branch are * * * *not* different in kind from provisions concerning relations between the branches: both sets of provisions safeguard liberty." *Ibid.* (emphasis in original); see also *Davis* v. *Michigan Dep't of Treasury*, 109

S. Ct. at 1507 (rejecting the State's argument that an individual taxpayer could not claim the protection of the intergovernmental tax immunity doctrine in seeking a tax refund because the purpose of the doctrine was "to protect governments and not private entities or individuals").

The right of individuals under the Commerce Clause to participate in a national market free of discriminatory or burdensome state regulation is also both a structural rule, allocating regulatory authority between the federal and state governments, and a personal right, freeing all individuals from discriminatory state regulation not authorized by Congress. While it is true that the Court on occasion has characterized the Commerce Clause as a structural provision of the Constitution, the Court also has spoken in terms of an individual's "right" to engage in interstate commerce free of burdensome and discriminatory state regulation.

As early as *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), Chief Justice Marshall recognized a "right" of constitutional dimensions to engage in "intercourse between state and state." Over the years, this Court has had frequent occasion to reemphasize that the right "[t]o carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." *Crutcher* v. *Kentucky*, 141 U.S. 47, 57 (1891); see also *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967) ("[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one"); *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1, 48 (1910); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867).

The dual character of the Commerce Clause is also supported by the historical record. While the Framers of the Constitution did refer to the need to prevent strife among the states as one justification for conferring the

commerce power upon the federal government, they also sought to protect individuals. Hamilton commented that one of the adverse consequences of continued "interfering and unneighborly regulation[]" by the states would be that "the citizens of each would at length come to be considered and treated by the others in no better light than that of foreigners and aliens." *The Federalist* No. 22, at 144-145 (Mentor ed. 1981); see also *The Federalist* No. 42, at 268 (J. Madison) (referring to the "unfair[ness]" of extraterritorial state regulation); 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed. 1937) (Commerce Clause prevented "injustice among the States themselves").

Moreover, characterizing the Commerce Clause as solely a "structural" provision of the Constitution simply makes no sense. The Clause does not allocate power between the states and the federal government arbitrarily. Like the Origination Clause, the Commerce Clause allocates power in order to protect individual rights. It divests the states of authority to discriminate against or unjustifiably burden interstate commerce in the absence of congressional authorization in order to protect persons engaged in interstate commerce against unfair or discriminatory regulation by states in which they have no political voice. *Nippert* v. *City of Richmond*, 327 U.S. 416, 425-426, 434-435 (1946); *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 45 n.2 (1940). While Commerce Clause principles often are referred to as protections for "interstate commerce," that abstraction is simply a shorthand reference to the millions of individuals engaged in interstate commerce who are the daily beneficiaries of these rights. See, *e.g.*, *Healy* v. *Beer Institute, Inc.*, 109 S. Ct. 2491, 2499-2502 (1989) (discussing protections afforded to merchants engaged in interstate commerce); *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266, 280-282 (1987).[8]

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[8] The principles embodied in the Commerce Clause thus bear no resemblance to rules that preempt state regulatory authority simply

Commerce Clause rights affect the liberty of American citizens to transact business on a national scale, free from burdens imposed by local legislatures that may be beholden to narrow, parochial interests. They are fundamental to the national citizenship that the Constitution was established to secure. Indeed, "[t]he entire Constitution was 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'" *Healy*, 109 S. Ct. at 2499 n.12 (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). These basic rights surely are protected by Section 1983.[7]

3. Respondents assert (Br. in Opp. 11, 13) that Section 1983 should not provide a remedy for violations of "economic" rights. But this Court already has rejected the contention that Section 1983 protects "personal" rights and not property rights. As the Court remarked in *Lynch*, 405 U.S. at 552, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. * * * [A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

to "maintain[] uniformity in the administration of * * * federal regulatory jurisdiction." *Golden State*, 110 S. Ct. at 451. Rather, the Commerce Clause limits state authority in order to protect persons engaged in interstate commerce against discriminatory and unreasonably burdensome regulation. Commerce Clause rules are substantive principles, not simply rules of administrative convenience.

[7] The rights conferred by the Commerce Clause should not be accorded lesser status because they may be overridden by congressional action. The same is true of the rights secured by federal "laws," which indisputably can form the basis for an action under Section 1983. As with statutory rights, the fact that Congress may eliminate a previously-existing Commerce Clause right is irrelevant when Congress has not acted. Such rights are fully enforceable as long as they exist, and therefore are cognizable under Section 1983. *Golden State*, 110 S. Ct. at 452.

Under this Court's decision in *Maine* v. *Thiboutot*, *supra*, federal statutes, including statutes that confer economic benefits, create rights cognizable under Section 1983. See, *e.g.*, *Wilder* v. *Virginia Hospital Ass'n*, 110 S. Ct. 2510 (1990). Indeed, the preemption claim at issue in *Golden State* was attacked on the ground that it was seeking to enforce an economic rather than a civil right, but the Court nonetheless held the claim cognizable under Section 1983. It would be anomalous indeed if the class of constitutional provisions giving rise to Section 1983 claims were drawn more narrowly.

CONCLUSION

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted.

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July 13, 1990

[redacted]

Supreme Court of the United States

October Term, 1999

MARK E. DENIER,
Petitioner,
v.

MARGARET L. HEGGEN, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Nebraska

BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
AMERICAN CONFERENCE ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
COUNCIL OF STATE GOVERNMENTS,
AND NATIONAL LEAGUE OF CITIES
AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether violations of the dormant Commerce Clause are actionable under 42 U.S.C. § 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1555

MARK E. DENNIS,
Petitioner,
v.
MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Nebraska

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and organizations throughout the United States. They have a compelling and continuing interest in the issue presented here: whether Commerce Clause violations may be challenged under 42 U.S.C. § 1983. *Amici* and their members do not mean to suggest by this that they wish to evade their responsibilities under the Clause, which historically has been enforced in state court and by means

of injunctive actions brought in federal court; their concern, instead, is that the availability of attorney's fees in Section 1983 litigation may prompt meritless and expensive lawsuits aimed at discouraging creative regulatory and tax initiatives. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Petitioner proposes an extraordinary change in the way that Commerce Clause claims are litigated. Dormant Commerce Clause actions most often are fought out in state courts under state causes of action, as they have been since early in the nineteenth century; the creation of general federal question jurisdiction late in that century also allowed the assertion in federal court of claims for injunctive relief grounded directly on the Commerce Clause. But so far as we are aware, no plaintiff even attempted to use Section 1983 as a cause of action to challenge Commerce Clause violations for more than 100 years after enactment of the statute. Notwithstanding this history, petitioner makes the surprising contention that Section 1983 remedies are essential to effectuate the Clause, candidly acknowledging that his primary interest is in obtaining attorney's fees.

Unfortunately, petitioner's interest in fees has led him to torture the language and history of Section 1983. The centerpiece of petitioner's argument is his assertion that a plaintiff may invoke Section 1983 whenever he has standing to complain of a violation of the Constitution. But the concepts of standing and cause of action are wholly distinct; the Court often has held that Congress did not provide a cause of action to parties who were injured by violations of the Constitution or federal statu-

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

tory law. The Court's decisions therefore indicate that the crucial question here is whether the Commerce Clause secures "rights" within the particular meaning of that term as it is used in Section 1983. There is no need to speculate on this: the Court has made quite clear that the inquiry whether a constitutional or statutory provision secures such "rights" turns, in relevant part, "on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.'" *Wilder v. Virginia Hospital Ass'n*, 110 S.Ct. 2510, 2517 (1990) (citation omitted).

On this, the historical evidence is overwhelming: the Commerce Clause was designed to minimize conflicts between the States and to safeguard federal authority, not to benefit particular individuals who engage in interstate commerce. That comes clear from the debates at the Constitutional Convention and the extensive discussions of the commerce power in *The Federalist*. As a result, this Court repeatedly has explained that the Clause was designed to serve national rather than individual ends, and expressly has indicated that the Clause protects *commerce* rather than the individuals who engage in it. Indeed, the Clause hardly can confer a personal entitlement to trade freely between the States when its plain terms grant Congress the authority to restrict the flow of interstate commerce. It therefore is not surprising that this Court long ago affirmed the judgment that the Commerce Clause does not secure "rights" within the meaning of 28 U.S.C. § 1343(3), Section 1983's jurisdictional counterpart. *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), aff'd, 305 U.S. 576 (1939).

2. The conclusion that the Commerce Clause does not secure "rights" within the meaning of Section 1983 is confirmed by the statute's legislative history. The proponents of Section 1983 themselves expressly distinguished between provisions of the Constitution that secure "rights" and those that allocate power between the States and the Federal Government; the Commerce

Clause plainly was understood to fall in the latter category.

The propriety of that understanding is made doubly clear by roughly contemporaneous actions of Congress and decisions of this Court. Just four years after passage of Section 1983's predecessor, Congress used considerably broader language in the statute creating general federal question jurisdiction—a statute that, unlike Section 1983's jurisdictional counterpart, had an amount-in-controversy requirement. If petitioner is correct in contending that plaintiffs may rely on Sections 1983 and 1343(3) whenever they have standing to assert violations of the Constitution, the federal question statute would have been unnecessary (and the jurisdictional amount requirement nugatory) from the outset, at least in constitutional litigation. The Court rejected this unlikely conclusion in some of its earliest decisions involving Section 1983's predecessor, holding that cases involving violations of power-allocating provisions "aris[e] under" the Constitution within the meaning of the federal question statute, but do not "secure rights" within the meaning of Sections 1983 and 1343(3). There is no reason for the Court to depart from that conclusion now.

ARGUMENT

VIOLATIONS OF THE COMMERCE CLAUSE ARE NOT COGNIZABLE UNDER 42 U.S.C. § 1983.

Petitioner and its *amici* fundamentally misdirect the inquiry in this case. Needless to say, we wholly agree with petitioner's vigorous assertion (Br. 19, 24) that he has standing to contest violations of the Commerce Clause that cause him injury. And we fully concur with *amicus* American Trucking Associations, Inc. ("ATA"), when it contends (Br. 5-7) that Section 1983 creates a cause of action that may be used to challenge the violation of any "right" that is "secured by the Constitution." But these contentions, in our view, are entirely

beside the point. As this Court's decisions make clear, the crucial question here is whether the Commerce Clause in fact *does* secure "rights" within the particular meaning of that term as it is used in Section 1983. We think it plain that the Commerce Clause does not create such "rights."

A. Federal Constitutional And Statutory Provisions Secure "Rights" Within The Meaning Of Section 1983 Only When They Are Designed For The Special Benefit Of Individuals.

The centerpiece of petitioner's argument is his contention that plaintiffs may invoke Section 1983 whenever they have *standing* to assert a violation of the Commerce Clause. See Pet. Br. 19, 24. But that contention simply disregards the plain language of the statute. Section 1983 does not, in terms, provide a cause of action for the redress of *all* violations of *all* constitutional provisions; instead, it comes into play only when there has been a deprivation of "rights, privileges, or immunities secured by the Constitution and laws."

In contrast, when Congress has wanted to write a statute that is broad enough to encompass all cases or controversies involving violations of the Constitution, it has known how to do so. It did just that (at least for a limited category of suits) in Section 25 of the Judiciary Act of 1789—reenacted just four years prior to the enactment of Section 1983's predecessor—which authorized this Court to hear appeals from decisions of state courts upholding the validity of state statutes that were challenged "on the ground of their being *repugnant to the constitution* * * * of the United States." 1 Stat. 73, 85, as amended by the Act of Feb. 5, 1867, § 2, 14 Stat. 385, 386 (emphasis added), codified at 28 U.S.C. § 1257.[2]

[2] ATA's reliance (Br. 4-5) on the portion of the Judiciary Act, also now codified at 28 U.S.C. § 1257, that authorizes review by this Court in cases where "any title, right, privilege, or immunity"

Congress took an equally broad approach shortly after enacting Section 1983, when it created federal jurisdiction for "all suits of a civil nature at common law or in equity * * * *arising under the Constitution* or laws of the United States." Act of Mar. 3, 1875, § 1, 18 Stat. (Pt. 3) 470 (emphasis added). And it used similarly expansive language in drafting the Declaratory Judgment Act, 28 U.S.C. § 2201 (emphasis added), which provides that, "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States * * * may declare the rights *and other legal relations* of any interested party." But Congress declined to draw Section 1983 in such broad terms.

The Court accordingly has emphasized several times that the reach of Section 1983, while substantial, is limited by its plain language: "'Section 1983 speaks in terms of "*rights*, privileges, or immunities," not violations of federal law.'" *Wilder v. Virginia Hospital Ass'n*, 110 S.Ct. 2510, 2517 (1990), quoting *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444, 448 (1989) (emphasis added by the Court). With this in mind, the Court has drawn a precise test to determine whether any particular constitutional or statutory provision secures such rights. In relevant part, this "inquiry turns on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.'" *Wilder*, 110 S.Ct. at 2517, quoting *Golden State*, 110 S.Ct. at 448. See *Golden State*, 110 S.Ct. at 449; *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 430 (1987); *id.* at 433 (O'Connor, J., dissenting).[3]

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is claimed under the Constitution or federal law, therefore is misplaced. In fact, Commerce Clause claims generally have reached this Court under the clause of the Act cited in the text.

[3] The test for existence of a "right" actually has three parts: "In deciding whether a federal right has been violated, we have considered [1] whether the provision in question creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' * * * [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' * * * [3] We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff.'" *Golden State*, 110 S.Ct. at 448. See *Wilder*, 110 S.Ct. at 2517; *Wright*, 479 U.S. at 430, 432; *id.* at 432-433 (O'Connor, J., dissenting). The first two prongs of this test are not at issue here. The Court also has made clear that, "even when the plaintiff has asserted a federal right, the defendant may show that Congress 'specifically foreclosed a remedy under § 1983' * * * by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.'" *Golden State*, 110 S.Ct. at 448 (citation omitted). There is no contention that Congress has done so here.

Under this approach, it is not enough that the provision at issue was drafted "with the interests of the general public in mind" and therefore "benefits particular parties only as an incident of the federal scheme of regulation" (*Golden State*, 110 S.Ct. at 450); to maintain a cause of action, the plaintiff must have been one of the provision's "intended beneficiaries." *Wilder*, 110 S.Ct. at 2517-2518. This rule of interpretation, it should be added, applies both to constitutional and to statutory provisions. That is made clear by the plain terms of Section 1983, which treat the Constitution and federal statutory law identically, and by the Court's decision in *Golden State*, which held that the provision of the Constitution at issue—there, the Supremacy Clause—"does not create rights enforceable under § 1983." 110 S.Ct. at 449.

This inquiry into the purposes served by the relevant provision is a familiar one, for "[w]hether a federal statute confers substantive rights is not an issue unique to § 1983 actions." *Wright*, 479 U.S. at 432 (O'Connor, J., dissenting). The first step in determining whether to imply a private right of action under a federal statute, for example, necessarily involves deciding whether the provision "create[s] a federal right in favor of the plain-

tiff," a question that turns on whether the plaintiff is "'one of the class for whose *especial* benefit the statute was enacted.'" *Cort v. Ash*, 422 U.S. 66, 78 (1975) (emphasis in original) (citation omitted). See *Wilder*, 110 S.Ct. at 2526 (Rehnquist, C.J., dissenting).[4] Cf. *Block v. Community Nutrition Institute*, 467 U.S. 340, 346-348 (1984) (applying similar test to determine whether review precluded under the APA). Indeed, at the time of enactment of Section 1983, courts recognized common law rights of action only under those statutes that were enacted for the benefit of special classes of persons. See, *e.g.*, *Hayes v. Michigan Central R.R. Co.*, 111 U.S. 228, 240 (1884); T. Cooley, *Law of Torts* 790 (2d ed. 1888). See generally *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 374-375 (1982).

Petitioner's attempt to equate the existence of a cause of action under Section 1983 with *standing* to assert a violation of the relevant constitutional provision therefore is inconsistent with this Court's decisions. And that conclusion is hardly surprising. As a general matter, of course, the concepts of standing and cause of action are wholly distinct. See *Davis v. Passman*, 442 U.S. 228, 239-240 n.18 (1979). Thus, to give just one related example, a plaintiff who has suffered injury may have standing to attempt implication of a right of action from a federal statute, even if he ultimately is found not to have a cause of action because Congress, in enacting the statute at issue, "was not concerned with the rights of individuals." *California v. Sierra Club*, 451 U.S. 287, 295 (1981). Indeed, in a setting very similar to this one, the Court has made clear that even prudential limitations on standing are more easily overcome than are the require-

[4] As Chief Judge Wald has noted, "where a separate congressionally created cause of action, § 1983, clearly exists, then the focus on whether the statute creates rights is appropriate, and the value of the first *Cort* factor is retained." *Edwards v. District of Columbia*, 821 F.2d 651, 655 n.4 (D.C. Cir. 1987) (opinion of Wald, C.J.).

ments for stating a cause of action; the Court noted that in the first prong of the *Cort* test—which parallels the "right" inquiry under Section 1983—"the Court was requiring more from the would-be plaintiffs * * * than a showing that their interests were arguably within the zone protected or regulated by [the statute]." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 400-401 n.16 (1987).[5]

Similar problems inhere in the more sophisticated but related argument offered by ATA, which suggests that petitioner is entitled to invoke Section 1983 because plaintiffs may seek injunctive and declaratory relief directly under the Constitution to remedy violations of the Commerce Clause. ATA Br. 13-14, citing *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 400 (1971). In fact, "[s]tatutory rights and obligations"—the type of rights created by Section 1983—"are established by Congress, and it is entirely appropriate for Congress, in creating those rights and obligations, to determine in addition who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. at 241. As the Court made clear in *Wilder* and *Golden State*, Congress has done just that in Section 1983. Indeed, as we explain more fully below (at 26-28), the Court held over a century ago that, while claims grounded directly on the Constitution may be brought into federal court under the broad terms of the statue providing for

[5] The so-called "zone of interest" prudential limitation on standing at issue in *Clarke* may be satisfied by a showing that the plaintiff's claim is "'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" 479 U.S. at 396, quoting *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). Under that test, "there need be no indications of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400. The Court applied the test in a state-court action under the Commerce Clause in *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977).

general federal question jurisdiction, Commerce Clause claims may not be asserted under the narrower provisions of Section 1983's predecessor. This is only logical; there is no reason to suppose that actions grounded directly on the Constitution to enjoin unconstitutional state conduct, on the one hand, and congressionally created actions for money damages, on the other, must be identical in scope.

B. The Commerce Clause Does Not Secure "Rights" With The Meaning Of Section 1983.

Against this background, the extensive argument by petitioner (Br. 15-16) and ATA (Br. 5-7) that Section 1983 safeguards all federal "rights" plainly is circular, since it begs the question whether the Commerce Clause secures "rights" within the meaning of the statute. That question must be answered by looking to whether individuals like petitioner are "intended beneficiaries" of the Clause. *Wilder*, 110 S. Ct. at 2517-2518. And on this, the historical evidence is overwhelming: the Clause was designed to minimize conflicts between the States and to safeguard federal authority, not to benefit particular individuals who engage in interstate commerce. "It is elementary to show that the framers had no personal rights focus when writing the commerce clause. * * * The framers' concern with economic union arose from conflicts among the states and problems of foreign trade, not from disputes between the states and individual merchants." Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U.L. Rev. 43, 46 (1988).

1. At the outset, the Commerce Clause plainly does not confer an entitlement, personal to the individual, to trade freely between the States; it does not, after all, "limit the authority of *Congress* to regulate commerce among the several States as it sees fit," or detract from Congress's authority to "'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Western & Southern*

Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 652 (1981) (emphasis in original), quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). Instead, like many of the other provisions of Article I of the Constitution, the Commerce Clause was designed to allocate regulatory authority "between the national and the state governments" (*Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945)), reflecting what Chief Justice Marshall described as "the deep and general conviction, that commerce ought to be regulated by Congress." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827). Like the Supremacy Clause—and unlike the statutory provision at issue in *Golden State*—the Commerce Clause thus is "designed * * * to answer the question whether state or federal regulations should apply to certain conduct." *Golden State*, 110 S. Ct. at 451-452. And it emphatically is not "akin to a rule that denies either sovereign the authority to abridge a personal liberty." *Ibid.* See *id.* at 455 (Kennedy, J., dissenting) (there is no "right" within the meaning of Section 1983 when a federal statute "permits the [plaintiff] to object only that the wrong sovereign has attempted to regulate its [activities]").[6]

The origins of the Clause confirm that it was not designed to create personal entitlements. It is generally agreed that, in the pre-constitutional period, the States regularly used imposts as commercial weapons against one another, while the Nation as a whole was unable to respond effectively to discriminatory trade regulations adopted by other countries. See Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn L. Rev. 432, 448-449, 465-469

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[6] The disagreement between the majority and the dissent in *Golden State* did not go to the proper interpretation of Section 1983; it turned, instead, on the narrow question whether particular provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, secure "rights." Compare 110 S.Ct. at 450-452 with *id.* at 453, 455 (Kennedy, J., dissenting).

(1941). Both of these themes were explored at length—and offered as the sole rationales for giving Congress the authority to regulate commerce—by Hamilton and Madison in *The Federalist*, which offers by far the fullest contemporary account of the genesis of the commerce power. See Abel, *supra*, 25 Minn. L. Rev. at 473.

In exploring the powers that should be conferred on the Federal Government, Hamilton posed the question, "what inducements could the States have, if disunited, to make war upon each other?" *The Federalist* No. 7, at 60 (Mentor ed. 1961) (hereinafter cited as "*Federalist*"). His answer, in part, was that "[c]ompetitions of commerce would be [a] fruitful source of contention. * * * Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. * * * The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars." *Id.* at 62-63. See also *Federalist* No. 6, at 54 (listing "rivalships and competitions of commerce" among "[t]he causes of hostility among nations"). Hamilton expanded on this concern in *Federalist* No. 22, explaining that

> [t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

Id. at 144-145.[7]

[7] Hamilton's remark that States might come to treat citizens of other States like "foreigners and aliens," cited by ATA (Br. 19),

For his part, Madison listed the Commerce Clause among the powers "which provide for the harmony and proper intercourse among the States," explaining that leaving regulation of commerce to the States "would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility." *Federalist* No. 42, at 267, 268. Indeed, some years later Madison declared that "it is very certain that [the Commerce Clause] grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice *among the States themselves.*" 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed. 1937) (letter from J. Madison to J.C. Cabell, Feb. 13, 1829) (emphasis added). See also *id.* at 547-548 (Madison's Convention notes indicating that "want of a general power over Commerce * * * engendered rival, conflicting and angry regulations").

The other element motivating inclusion of the Commerce Clause in the Constitution was the conviction that federal control over commerce would strengthen both the Nation's international position and the strength of its domestic economy, which in turn would assist foreign commerce. The absence of federal supervision over commerce, Hamilton explained, "has already operated as a bar to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States." *Federalist* No. 22, at 144. See *Federalist* No. 11, at 84-89. And Hamilton emphasized the value of free trade for a healthy economy:

> An unrestrained intercourse between the States themselves will advance the trade of each by an

was made during the course of this discussion, immediately after his account of relations among the German principalities. *Federalist* No. 22, at 145. Hamilton's point was that such actions would engender animosity between States, not that individuals should be entitled to favorable treatment for their own sakes.

> interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope from the diversity in the productions of different States. * * * The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions.

Id. at 89-90.

Debate on the Commerce Clause at the Convention was directed largely at the regulation of foreign commerce and navigation. See Abel, *supra*, 25 Minn. L. Rev. at 446-448, 451-459, 465-466, 470. Interstate commerce received remarkably little attention; the most authoritative examination of the debates indicates that the subject appears only nine times in the records of the Convention. See *id.* at 470-471 & nn. 169-175, citing 2 M. Farrand, *supra*, at 308, 360, 361, 418, 441, 451-452, 504, 588-589. And all of these references, like the discussion in *The Federalist*, were directed at the danger of friction and discrimination between States. There was no mention whatsoever of anything resembling an individual entitlement to engage in interstate commerce.

Against this background, it is hardly surprising that the Court has explained the Clause as a response to "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326

(1979). The grant of regulatory authority to the Federal Government in the Clause was designed to serve national rather than individual ends, the Court indicated, by forestalling this "drift toward anarchy and commercial warfare" that "came 'to threaten at once the peace and safety of the Union.'" *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 533 (1949) (citation omitted). The Clause thus embodies "the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States." *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986). See *Brown*, 25 U.S. (12 Wheat.) at 446; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224-225 (1824) (Johnson, J., concurring).[8]

Of course, individuals may benefit from the existence of the national free trade area that, in the absence of restrictive congressional action, is created by the dormant Commerce Clause. But that benefit—in contrast to those conferred by, for example, the Bill of Rights or the Civil War Amendments—is incidental. Indeed, the Court has specifically contrasted the Commerce Clause with one of these latter provisions, explaining that the Commerce

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[8] In *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852), the decision generally cited as the foundation of dormant Commerce Clause doctrine (see *A & P Tea Co. v. Cottrell*, 424 U.S. 366, 370-371 (1976)), the Court grounded its conclusion that the Constitution precludes certain forms of state regulation on the proposition that "[w]hatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to have such a nature as to require exclusive legislation by Congress." *Cooley*, 53 U.S. (12 How.) at 319. At other points, the Court has offered slightly varying theories to explain the doctrine: that congressional authority over the regulation of commerce was meant to be exclusive (see, *e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 209; *id.* at 226-239 (Johnson, J., concurring)); or that Congress, by its silence, had indicated its intent to preclude state legislation (see, *e.g.*, *Leisy v. Hardin*, 135 U.S. 100, 109-110 (1890)). All of these theories were premised on the understanding that the Clause was designed to allocate power rather than create individual rights.

and Equal Protection Clauses "perform different functions in the analysis of the permissible scope of a State's power—one protects *interstate commerce*, and the other protects *persons* from unconstitutional discrimination by the States." *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985) (emphasis added) (footnote omitted). This is so, of course, because the Commerce Clause "'protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978). It is clear, then, that "judicial enforcement of such [Commerce Clause] limits on state government at the behest of private parties no more secures an individual right for the purposes of § 1983 than it does in the context of the supremacy clause, or other provisions that allocate power between the states and federal government." Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1550 (1989) (footnotes omitted).

2. In arguing to the contrary, petitioner (Br. 20-21) and ATA (Br. 15-16, 18) point to occasional references in this Court's decisions to a "right" to engage in interstate commerce. But the Court's use of the word "right" in a different context hardly amounts to a determination that the Commerce Clause secures "rights" within the meaning of Section 1983. Indeed, the Court has made clear that violation even of a statute that—unlike the Commerce Clause—*expressly* "speaks in terms of 'rights'" may not be actionable under Section 1983 if those "rights" are not of the sort described by the latter provision. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18 (1981). And the decisions cited by petitioner and ATA, insofar as they discuss the purpose of the Commerce Clause at all, confirm that it was designed to allocate power and assure federal supremacy. See, *e.g.*,

Crutcher v. Kentucky, 141 U.S. 47, 58 (1891); *Gibbons*, 22 U.S. (9 Wheat.) at 209, 210. Otherwise, those decisions stand only for the unexceptionable proposition that the Clause may be asserted in state court, either offensively or (more often) defensively, to challenge state action that is inconsistent with the Constitution.[9]

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[9] See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977); *Morgan v. Virginia*, 328 U.S. 373, 376-377 (1946); *Edwards v. California*, 314 U.S. 160, 170-173 (1941); *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 48 (1910); *Gibbons*, 22 U.S. (9 Wheat.) at 211. *Cf. Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (dictum). ATA also cites (Br. 18) *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867); in fact, however, that decision, which involved the right to travel, rejected the contention that the right could be found in the Commerce Clause and instead implied it from the terms of the Constitution as a whole. See *id.* at 43-49; compare *id.* at 49 (opinion of Clifford, J.) (disagreeing with Court and placing right in the Commerce Clause). The only decision cited by petitioner (Br. 21) and ATA (Br. 15-16) that provides even arguable support for their position is *United States v. Guest*, 383 U.S. 745 (1966), which held that an indictment alleging a conspiracy to deprive citizens of the right to travel stated a violation of 18 U.S.C. § 241, one of Section 1983's criminal counterparts. See 383 U.S. at 757-758. In doing so, the Court observed that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution" (*id.* at 758), noting at least one prior decision holding that the Commerce Clause protects interstate travel. See *id.* at 758-759, citing *Edwards*. But ATA's suggestion (Br. 15) that the Court "[r]el[ied] principally upon the Commerce Clause" as the source of this right is substantially overstated. To the contrary, the Court also relied on a number of other cases, including *Crandall*, that had not been grounded on the Commerce Clause. See *Guest*, 383 U.S. at 757-758. And the Court concluded that, "[a]lthough there have been recurring differences in emphasis within the Court as to the source of the constitutional right to interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists." *Id.* at 759 (footnote omitted). This is an awfully thin reed on which to hang the proposition that the Commerce Clause generally confers an individual right to engage in interstate commerce. In fact, since deciding *Guest* the Court several times has declined "to ascribe the source of this right to travel interstate to a particular constitutional provision" (*Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) (foot-

Relying on *United States v. Munoz-Flores*, 110 S. Ct. 1964 (1990), petitioner (Br. 27-28) and ATA (Br. 17) also contend that particular provisions of the Constitution may have been intended to serve dual purposes by both allocating powers and protecting individual freedoms. Needless to say, we agree: certain provisions may well have been drafted with those two ends in mind. As we explained above, however, the Commerce Clause itself is not such a provision.[10] Certainly, *Munoz-Flores* is of no help to petitioner on this point. That decision concerned an entirely different provision of the Constitution, the Origination Clause of Art. I, § 7, cl. 1. Moreover, as a limitation on the operations of the Federal Government, neither that Clause nor any other separation of powers guarantee ever may be asserted in a Section 1983 action. And in any event, whether separation of powers guarantees secure "rights" of the sort described in Section 1983—an interesting question the answer to

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note omitted)), noting that "[i]t has been variously ascribed to the Privileges and Immunities Clause of Art. IV, * * * to the Commerce Clause, * * * and to the Privileges or Immunities Clause of the Fourteenth Amendment." *Attorney General v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion). See *id.* at 920 (O'Connor, J., dissenting) (placing right in the Privileges and Immunities Clause of Art. IV, § 2). The Court has since cited *Guest* as standing for the proposition that the right may be "inferred from the federal structure of the government adopted by our Constitution." *Id.* at 902 (plurality opinion).

[10] Of course, the Commerce Clause—like every other provision of the Constitution and every public law—ultimately was written "with the interests of the general public in mind." *Golden State*, 110 S.Ct. at 450. But that sort of global purpose plainly does not create "rights" within the meaning of Section 1983. See *ibid.*; *Sierra Club*, 451 U.S. at 295 (finding first prong of *Cort* test not satisfied when the statute at issue was "designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce" and "was not concerned with the rights of individuals"). The Court necessarily held as much in *Golden State* when it concluded that the Supremacy Clause does not secure "rights" under Section 1983.

which is by no means apparent—is wholly beside the point in a case that turns on the meaning of the Commerce Clause.[11]

Indeed, when it has addressed the issue directly, the Court rejected the contention that the Commerce Clause creates "rights" within the meaning of Section 1983. In *Connor v. Rivers*, 25 F. Supp. 937 (N.D. Ga. 1938), aff'd, 305 U.S. 576 (1939), the plaintiff, asserting a Commerce Clause violation, attempted to premise federal jurisdiction on, among other provisions, the predecessor to 28 U.S.C. § 1343(3), Section 1983's jurisdictional counterpart.[12] A three-judge district court held itself without jurisdiction to hear the case, explaining that, "while there is an allegation about the [state] statute's interfering with interstate commerce, it is clear that there is no claim or evidence that said [state] statute deprives the petitioner 'of any right, privilege, or immunity, secured by the Constitution of the United

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[11] Petitioner (Br. 28) and ATA (Br. 17-18) also rely on *Davis v. Michigan Dep't of Treasury*, 109 S.Ct. 1500, 1507 (1989). But the Court's holding there—that plaintiffs may take advantage of the intergovernmental immunity doctrine in a state cause of action—hardly amounts to a conclusion that the doctrine creates "rights" within the meaning of Section 1983. To the contrary, Justice Kennedy, author of the Court's opinion in *Davis*, has made clear that, "[f]rom the earliest cases interpreting our constitutional law to the most recent ones, we have acknowledged that a private party can assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States." *Golden State*, 110 S.Ct. at 452 (Kennedy, J., dissenting). But "[t]he injured party does not need § 1983 to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system." *Id.* at 453.

[12] Section 1343(3) is in relevant part identical to Section 1983, giving the district courts jurisdiction to entertain claims asserting the deprivation "of any right, privilege, or immunity secured by the Constitution of the United States * * *." See *Golden State*, 110 S.Ct. at 449 n.4.

States * * *.'" 25 F. Supp. at 938. On appeal, this Court found the issue sufficiently clear that it affirmed the judgment summarily. 305 U.S. 576. And in subsequent years a substantial majority of the courts to address the issue—including four federal courts of appeals [13] and the highest courts of New Hampshire, Georgia, Maine, and New Jersey [14]—have held that violations of the Commerce Clause are not cognizable under Section 1983. There is no reason for the Court to revisit the issue now.

C. The Legislative History Of Section 1983 Confirms That Power-Allocating Provisions Of The Constitution Do Not Secure "Rights" Within The Meaning Of The Statute.

1. Our reading of Section 1983 draws substantial support from the statute's legislative history. While the congressional debates were largely directed at the question of federal power to enact the Civil Rights Act of 1871, Section 1 of which was the predecessor to Section 1983,

[13] See *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144-1145 (8th Cir.), cert. denied, 469 U.S. 834 (1984); *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989); *Pesticide Public Policy v. Village of Wauconda*, 622 F. Supp. 423, 435-436 (N.D. Ill. 1985), aff'd, 826 F.2d 1068 (7th Cir. 1987); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985). While two courts of appeals have permitted Commerce Clause claims to proceed under Section 1983, their discussions of the issue were, at best, conclusory. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980). Although the issue was briefed before this Court when it considered the Eleventh Circuit's decision in *Continental Illinois Corp. v. Lewis*, 838 F.2d 457 (11th Cir. 1988), vacated as moot, 110 S.Ct. 1249 (1990), the court of appeals in that case did not expressly address the Section 1983 question.

[14] *Georgia v. Private Truck Council*, 371 S.E.2d 378, 381 (Ga. 1988); *Private Truck Council v. State*, 534 A.2d 13, 18 (N.J. Super. Ct. 1987), aff'd, 544 A.2d 33 (N.J. 1988); *Private Truck Council of America v. State*, 517 A.2d 1150, 1157 (N.H. 1986); *Private Truck Council v. Secretary of State*, 503 A.2d 214, 221 (Me. 1986).

virtually every specific mention of the rights secured by the statute referred to provisions of the Constitution that were intended to protect individuals, such as the Bill of Rights and the Civil War Amendments. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 475-476 (1871) (remarks of Rep. Dawes) (Privileges and Immunities Clause and Bill of Rights); *id.* at App. 84-85 (remarks of Rep. Bingham) (equal protection, first eight Amendments, and "rights of conscience"); *id.* at App. 153 (remarks of Rep. Garfield) (equal protection). See generally *Monell v. New York City Department of Social Services*, 436 U.S. 658, 665, 683-689 (1978).

These "rights of American citizenship" (Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871) (remarks of Rep. Shellabarger)) could hardly have been thought to include an entitlement to engage in interstate commerce; after all, it already was well-established at the time that Congress could restrict such commerce, or could authorize the States to do so. See, *e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 207-208. And while ATA correctly notes (Br. 7) occasional references during the legislative debates to the pre-Bill of Rights Constitution, those references were confined to the one provision of the Constitution of 1787 that was designed for the specific protection of individuals—the Privileges and Immunities Clause of Art. IV, §2.[15] See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess.

[15] ATA suggests (Br. 7) that Representative Cook offered the Contracts Clause as a rights-creating provision during the debates. In fact, however, Representative Cook apparently meant to suggest, not that the Clause itself created rights, but that persons had a right of access to the courts—a subject that was of considerable concern in the southern States during the Reconstruction period. He stated that, "if we had conspired to prevent the clerk of the [state] court from certifying the case [involving the Contracts Clause] to the Supreme Court of the United States, and thus deprived that plaintiff of a right under the Constitution of the United States, we should have been committing an offense against the United States which might be punished by national law." Cong. Globe, 42d Cong., 1st Sess. 486 (1871) (remarks of Rep. Cook). Representative Cook added that "[w]e have the right to so frame

332-333 (1871) (remarks of Rep. Hoar); *id.* at 475 (remarks of Rep. Dawes); *id.* at 575 (remarks of Sen. Thurman); *id.* at App. 69 (remarks of Rep. Shellabarger).[16]

Indeed, the proponents of the Civil Rights Act of 1871 themselves expressly distinguished between provisions of the Constitution that allocate power and those that create individual rights. Thus Representative Shellabarger—who chaired the Committee that drafted Section 1983's predecessor, introduced the bill, and was its floor manager in the House (see *Monell*, 436 U.S. at 665, 669)—explained the distinction:

> Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in the tenth section of the first article, that "no State shall make a treaty," "grant letters of marque," "coin money," "emit bills of credit," &c., relate to the division of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and

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the law that a man shall not be deprived of a hearing in the Supreme Court of the United States in a proper case by unlawful means." *Ibid.*

[16] Indeed, in defining "rights," Members of Congress pointed most often to the protections conferred by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. In particular, many Members pointed to (and quoted from) Justice Washington's influential opinion in *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,730). See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 334 (remarks of Rep. Hoar) (1871); *id.* App. 69 (remarks of Rep. Shellabarger). See Note, *Development: Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1155-1156 (1977). That holding was characterized by different Members in varying ways (see *ibid.*), and others rejected *Corfield* as a guide to the rights protected by the 1871 Act. See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 152 (1871) (remarks of Rep. Garfield); *id.* at App. 314 (remarks of Rep. Burchard). But it is clear that *Corfield*—which rejected both a Commerce and a Privileges and Immunities Clause challenge to a state law excluding out-of-state residents from a State's oyster beds (see 6 Fed. Cas. at 552)—does not, and was not understood to, establish a right to engage in interstate commerce.

> as between the States and such persons therein. *These prohibitions upon the political powers of the States are all of such a nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" those provisions of the Constitution.* But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.

Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871) (emphasis added). As several courts of appeals have recognized, "the implication of Rep. Shellabarger's statement is that § 1983 was enacted to provide a remedy for the latter category of constitutional violation he mentions, and not the former." *Consolidated Freightways*, 730 F.2d at 1146 n.16. See *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 849 (9th Cir.), cert. denied, 479 U.S. 1060 (1987). See also *Golden State*, 110 S.Ct. at 454 Kennedy, J., dissenting) (Rep. Shellabarger "recognized and explained the distinction").

Representative Shellabarger went on to explain that there were three provisions of the original Constitution that "secure[] the right or the liabilities of persons within the States, as between such persons and the States"—the Privileges and Immunities, Extradition, and Fugitive Slave Clauses of Art. IV, § 2. Cong. Globe, 42d Cong., 1st Sess. App. 69 (1871). He noted that Congress already had enacted legislation that, in one way or another, enforced each of these provisions, "the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for." *Id.* at App. 69-70. And in defending Congress's authority to enact the Civil Rights Act of 1871, he added:

> I must not * * * be told, as an answer to my argument, that there is no legislation executing those

> other provisions of the Constitution denying powers to the States, as, for example, those providing that no State shall make any law impairing the obligation of contracts or make treaties, and all those similar prohibitions. *The fact that there has been no legislation upon these subjects*, as I have already said, is simply because there has been no need of any. The decision of the Supreme Court of the United States, striking down the State laws which attempted to invade those provisions of the Constitution, ended the State legislation. *But that would not do where personal rights were invaded by the States.*

Id. at App. 70 (emphasis added).

This passage is doubly revealing. It confirms Representative Shellabarger's view that power-allocating provisions of the Constitution do not secure "personal rights." At the same time, Representative Shellabarger made clear his understanding that "there has been no legislation upon these subjects." Yet five years earlier, Congress had enacted the Civil Rights Act of 1866, 14 Stat. 27, which was identical in scope to Section 1 of the Civil Rights Act of 1871, Section 1983's predecessor; the 1871 Act simply added civil remedies to the criminal penalties created in 1866. See Note, *supra*, 90 Harv. L. Rev. at 1155-1156. Representative Shellabarger was aware of this, of course, having himself just described Section 1983's predecessor as being identical in its reach to the 1866 Act. See Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871). He therefore must have been of the view that neither the 1866 Act nor Section 1 of the 1871 Act created a cause of action for violations of power-allocating provisions of the Constitution.[17]

[17] ATA contends (Br. 9-11) that Representative Shellabarger's comments are not probative because they were delivered during his defense of Section 2 of the Civil Rights Act of 1871, rather than as part of his analysis of the companion Section 1, the predecessor of Section 1983. In fact, however, three Justices already have found his remarks an authoritative account of the purposes of Section 1983. See *Golden State*, 110 S. Ct. at 454 (Kennedy, J., dissenting).

This was hardly an idiosyncratic view, as petitioner (Br. 3-34) and ATA (Br. 10-11) contend—which is not surprising, given Representative Shellabarger's leading role in shepherding the bill into law. Representative Hoar, for example, in one of the few express references to the commerce power in the debates, noted that "[t]he powers given to Congress by the Constitution may be classed under two general heads: powers given for the protection of commerce, powers given for the protection and preservation of the fundamental civil rights of man." Cong. Globe, 42d Cong., 1st Sess. 333 (1871). He therefore specifically contrasted "[t]he protection and regulation of commerc[e]" with "the provisions of our Constitution for the protection of personal liberty and civil rights." *Ibid.* Similarly, Senator Trumbull explained that

> when the Constitution of the United States was formed, it was formed for general purposes, for the purpose of establishing a nation with national authority, authority to make war, to conclude peace. to make treaties, to regulate commerce between the States and with foreign governments, and to do various things of a national character; but the protection of the individual citizens was left to the

And they did so with good reason. The version of Section 2 discussed by Representative Shellabarger differed from Section 1 in the remedies it offered rather than the rights it protected: it created criminal penalties for acts "in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States," so long as the acts in question would have been amounted to one of several specified crimes if committed in a place under exclusive federal jurisdiction. See *Monroe v. Pape*, 365 U.S. 167, 180-181 (1961). There is no reason to doubt that the substantive scope of Sections 1 and 2—in particular, the nature of the "rights" they described—were identical. ATA also notes that Representative Shellabarger's remarks were made during his defense of Congress's power to enact Section 2. While correct, this observation is irrelevant: Representative Shellabarger's understanding of the nature of the various provisions of the Constitution, and of the history of congressional attempts to enforce them, surely bears on his understanding of the terms used in the Civil Rights Act of 1871.

> States, except that there is a clause in the Constitution of the United States which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

Id. at 575.

2. This understanding that Section 1983's predecessor could not be used to challenge violations of power-allocating provisions of the Constitution is confirmed by roughly contemporaneous actions of Congress and decisions of this Court. As we note above, just four years after passage of the Civil Rights Act of 1871, Congress created the general federal question jurisdiction for suits "arising under the Constitution or laws of the United States." 18 Stat. (Pt. 3) 470. Congress presumably attributed some significance to its choice of different—and broader—language for the federal question statute than had been used in the predecessors to Section 1983 and its companion jurisdictional provision, 28 U.S.C. § 1343(3). Moreover, while broader in scope than Section 1983, the federal question statute required satisfaction of a jurisdictional amount requirement. If petitioner is correct in contending that plaintiffs may rely on Sections 1983 and 1343(3) whenever they have standing to challenge a violation of the Constitution, the federal question statute would have been unnecessary (and the jurisdictional amount requirement nugatory) from the outset, at least in constitutional litigation. Congress could hardly have intended to establish such a scheme. See Collins, *supra*, 77 Geo. L.J. at 1553-1554.

And from the outset, this Court's decisions made clear that Congress had no such intention. In *Carter v. Greenhow*, 114 U.S. 317 (1885), one of the Court's earliest interpretations of the Civil Rights Act of 1871, the plaintiff attempted to assert a Contracts Clause violation under Section 1983's predecessor, alleging that a state statute impaired his contractual right to pay taxes in state-issued coupons. The Court rejected the claim in language strikingly similar to that used by Representative Shellabarger, stating that the Clause "so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally." *Id.* at 322. The Court added that "[t]he mode in which Congress has legislated in aid of the rights secured by that clause of the Constitution, is * * * by conferring jurisdiction upon the Circuit Courts by the Act of March 3, 1875, ch. 137, 18 Stat. 470, of all cases arising under the Constitution and laws of the United States. * * * Congress has provided no other remedy for the enforcement of this right." 114 U.S. at 322-323. See *id.* at 323.[18] Because the plaintiff in *Carter* was unable to satisfy the federal question statute's jurisdictional amount requirement, his claim was dismissed. See *id.* at 320, 322-323.

At the same time, however, the Court allowed a virtually identical companion case to proceed because it was grounded directly on the Contracts Clause and entered federal court under the federal question statute rather than the predecessor to Section 1343(3); the action was an early version of the type of injunctive suit, drawing its cause of action directly from the Constitution, that the Court later recognized in *Bell v. Hood*. "The present action," the Court explained, "as shown on the face of the declaration, was a case arising under the Constitution." *White v. Greenhow*, 114 U.S. 307, 308

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[18] ATA maintains (Br. 11-12) that *Carter* was decided on a pleading technicality. But there is nothing in the opinion to support this proposition. The Court noted the allegations in the plaintiff's complaint that he had " 'the right under the Constitution of the United States to pay his said taxes to the said defendant in the said coupons and money, and that this right is secured to him by the Constitution of the United States.' " *Carter*, 114 U.S. at 319. As we indicate above, the Court rejected this contention; its holding involved an analysis of the nature of the "right" secured by the Contracts Clause. See Collins, *supra*, 77 Geo. L. Rev. at 1518, 1535 n.221. The portion of Justice Stone's opinion in *Hague v. CIO*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.), relied upon by ATA was directed principally at the meaning of the statutory term "secured by" and not at the substance of the Contracts Clause. Cf. *Golden State*, 110 S.Ct. at 454 (Kennedy, J., dissenting).

(1885). These two cases in combination, as one commentator has noted, effectively read "the federal question statute [to] pick[] up where § 1983 left off." Collins, *supra*, 77 Geo. L.J. at 1519. Cf. *Pleasants v. Greenhow*, 114 U.S. 323, 323-324 (1885).

Of particular importance here, the Court took an identical approach in cases involving the Commerce Clause. In *Bowman v. Chicago & Northwestern Ry.*, 115 U.S. 611, 614-615 (1885), the plaintiff challenged, apparently on Commerce Clause grounds, a state statute that restricted interstate deliveries of liquor. See Collins, *supra*, 77 Geo. L.J. at 1520. When unsuccessful in the lower court, the plaintiff attempted to bring the action to this Court under Rev. Stat. § 699 (1874), one of the jurisdictional counterparts to Section 1983's predecessor that permitted appeals—without a jurisdictional amount requirement—in suits involving deprivations of "any right, privilege or immunity secured by the Constitution"; as in *Carter*, the plaintiff was unable to satisfy the amount in controversy requirement of the general federal jurisdiction statute. See 115 U.S. at 613-615. The Court dismissed the appeal for want of jurisdiction, explaining that "[t]he case may be arising under the Constitution, within the meaning of that term, as used in other statutes, but it is not one brought on account of the deprivation of a right, privilege or immunity secured by the Constitution, within the meaning of this provision." 115 U.S. at 615-616. Yet several years later, the Court permitted an action brought directly under the Commerce Clause when federal jurisdiction was premised on the statute providing for federal question jurisdiction. *Scott v. Donald*, 165 U.S. 58, 72-73, 100 (1897). See Collins, *supra*, 77 Geo. L.J. at 1520-1521.

These decisions offer a persuasive contemporary reading of Section 1983's predecessor. And the distinction they drew remains good law. Indeed, just last Term Justice Kennedy, citing 28 U.S.C. §§ 1331, 2201, and 2202, noted that plaintiffs may seek "declaratory and

equitable relief in the federal district courts through their powers under federal jurisdictional statutes. * * * These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983." *Golden State*, 110 S. Ct. at 455 (Kennedy, J., dissenting). Petitioner's reading would eliminate the distinctions between these statutes.

D. Allowing Commerce Clause Suits To Proceed Under Section 1983 Would Dramatically Change The Nature Of Commerce Clause Litigation.

We should add that petitioner's approach would lead to a dramatic change in the way that Commerce Clause claims are litigated. In the years prior to the Civil War, of course, Commerce Clause challenges were (in the absence of diversity) fought out in the state courts under state causes of action, and reached this Court on review from those courts. See generally Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U.L. Rev. 1, 3-4 (1985). Most Commerce Clause cases still reach the Court in that way. The creation of general federal question jurisdiction in 1875 also allowed the assertion in federal court of claims for injunctive or declaratory relief grounded directly on the Constitution. But so far as we are aware, no plaintiff even attempted to use Section 1983 as a cause of action to challenge Commerce Clause violations until over a century after enactment of the statute.[19] This Court never has endorsed such a use of Section 1983, and the lower courts, which have started to address the issue only in the last few years, have overwhelmingly rejected it. See notes 13, 14, *supra*.

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[19] Section 1983 was used sparingly for any purpose prior to the Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961). See Note, *supra*, 90 Harv. L. Rev. at 1167-1169. And we are not aware of any decision resting on the proposition that Commerce Clause claims may be brought under Section 1983 prior to *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-1305 (D. Mont. 1975), aff'd on other grounds, 425 U.S. 463 (1976).

Against this background, petitioner's contention (Br. 12-13 & n.8) that Section 1983 remedies—and attorney's fees—are necessary to effectuate the Clause is simply silly. The values protected by the Clause have, in fact, remained healthy for over two centuries without any such cause of action. This case is an illustration of why that is so: petitioner prevailed in state court under a state cause of action on the merits of his Commerce Clause claim, obtaining injunctive relief and entitlement to a refund of the unconstitutional state tax. Pet. App. 30a. Petitioner thus candidly acknowledges (Br. 12) that his principal interest in the Section 1983 action is the prospect of obtaining attorney's fees and costs. In other cases, of course, recourse to Section 1983 in suits of this sort also would mean that plaintiffs could evade the exhaustion of remedies, payment under protest, and similar procedural devices that are essential elements of all state tax systems.[20] In our view, this Court's precedents and the language of Section 1983 should not be tortured to accomplish that result.

CONCLUSION

The judgment of the Nebraska Supreme Court should be affirmed.

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[20] Indeed, given Congress's longstanding respect for the integrity of state tax systems, expressed most clearly in the Tax Injunction Act, 28 U.S.C. § 1341, we think that a compelling case may be made for the proposition that Congress did not mean Section 1983 to disrupt state tax administration. Under the Tax Injunction Act, federal courts may not entertain suits involving challenges to state taxation; even prior to the enactment of the Tax Injunction Act, principles of comity precluded federal courts from entertaining such actions. See *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 107-109 (1981). Petitioner's suit therefore may proceed only if Congress meant Section 1983 to create a remedy that is available exclusively in state courts. That is hardly likely. We accordingly agree with respondents' suggestion (Br. 45-49) that, if the Court finds that the Commerce Clause secures "rights" within the meaning of Section 1983, it should leave open the question how Section 1983 applies in state tax cases.

Respectfully submitted,

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August 15, 1990